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Introduction

1. The Commission, at its twenty-ninth session (1996), decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It was agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.[1]

2. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). The Working Group indicated to the Commission that it had reached consensus as to the importance of, and the need for, working towards harmonization of law in that area. While no firm decision as to the form and content of such work had been reached, the Working Group had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156-157).

3. The Commission endorsed the conclusions reached by the Working Group and entrusted the Working Group with the preparation of draft uniform rules on the legal issues of digital signatures and certification authorities (hereinafter referred to as "the Uniform Rules").

4. With respect to the exact scope and form of the Uniform Rules, the Commission generally agreed that no decision could be made at this early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the Uniform Rules should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as "the Model Law"). Thus, the Uniform Rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, the Uniform Rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.[2]

5. The Working Group began the preparation of the Uniform Rules at its thirty-second session on the basis of a note prepared by the Secretariat (A/CN.9/WG.IV/WP.73).

6. At its thirty-first session (1998), the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). The Commission expressed its appreciation of the efforts accomplished by the Working Group in its preparation of draft Uniform Rules on Electronic Signatures. It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that arose from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found

as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress realized so far indicated that the draft Uniform Rules on Electronic Signatures were progressively being shaped into a workable structure.

7. The Commission reaffirmed the decision made at its thirty-first session as to the feasibility of preparing such Uniform Rules and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session (New York, 29 June-10 July 1998) on the basis of the revised draft prepared by the Secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.[1]

8. At its thirty-second session (1999), the Commission had before it the report of the Working Group on the work of its thirty-third (July 1998) and thirty-fourth (February 1999) sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of draft uniform rules on electronic signatures. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based.

9. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. As currently envisaged by the Working Group, the Uniform Rules placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view expressed was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce. While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

10. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate (see above, para. 3). With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e., key holders, certification authorities and relying parties) corresponded to one possible PKI model, but that other models were conceivable, e.g., where no independent certification authority was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the Uniform Rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether two of those functions were served by the same person (e.g., where the certification authority was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (ibid., para. 68).

11. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules (see above, paras. 3 and 7) and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.[4]

12. The Working Group on Electronic Commerce, which was composed of all the States members of the Commission, held its thirty-sixth session in New York from 14 to 25 February 2000. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Brazil, Bulgaria, Cameroon, China, Colombia, Egypt, Finland, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

13. The session was attended by observers from the following States: Angola, Argentina, Belgium, Bolivia, Canada, Cuba, Czech Republic, Gabon, Indonesia, Iraq, Israel, Kuwait, Kyrgyzstan, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Saudi Arabia, Sierra Leone, Sweden, Switzerland, Trinidad and Tobago, Tunisia and Turkey.

14. The session was attended by observers from the following international organizations: Economic Commission for Europe, United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme/ Inter-Agency Procurement Services Office (UNDP/IAPSO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), World Intellectual Property Organization (WIPO), African Development Bank, Commonwealth Secretariat, European Commission, Organisation for Economic Cooperation and Development (OECD), Organization of the American States (OAS), Cairo Regional Centre for International Commercial Arbitration, Commercial Finance Association (CFA), Electronic Frontier Foundation Europe, Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), Inter-American Bar Association, International Bar Association (IBA), International Chamber of Commerce (ICC), Internet Law and Policy Forum (ILPF), Society for Worldwide Interbank Financial Telecommunication (SWIFT), World Association of Former United Nations Interns and Fellows (WAFUNIF), *Union internationale des avocats* and *Union internationale du notariat latin* (UINL).

15. The Working Group elected the following officers:

Chairman: Mr. Jacques GAUTHIER (Canada, elected in his personal capacity);

Rapporteur: Mr. Aly Sayed KASSEM (Egypt).

16. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.83); note by the Secretariat containing revised draft uniform rules on electronic signatures (A/CN.9/WG.IV/WP.84).

17. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Legal aspects of electronic commerce: draft uniform rules on electronic signatures.

4. Other business.

5. Adoption of the report.

I. Deliberations and decisions

18. The Working Group discussed the issue of electronic signatures on the basis of the note prepared by the Secretariat (A/CN.9/WG.IV/WP.84). The deliberations and conclusions of the Working Group with respect to those issues are reflected in section II below.

19. After discussion of draft articles 1 and 3 to 12, the Working Group adopted the substance of those draft articles and referred them to a drafting group to ensure consistency between the provisions of the Uniform Rules. The Working Group subsequently reviewed the report of the drafting group, which is contained in the annex to this report.

20. The Secretariat was requested to prepare a draft guide to enactment of the provisions adopted. Subject to approval by the Commission, the Working Group recommended that draft articles 2 and 13 of the Uniform Rules, together with the guide to enactment, be reviewed by the Working Group at a future session.

II. Draft uniform rules on electronic signatures

A. General remarks

21. At the outset, the Working Group exchanged views on current developments in regulatory issues arising from electronic commerce, including adoption of the Model Law, electronic signatures and public key infrastructure (referred to here as "PKI") issues in the context of digital signatures. These reports, at the governmental level, confirmed that addressing electronic commerce legal issues was recognized as essential for the implementation of electronic commerce and the removal of barriers to trade. It was reported that a number of countries had introduced recently, or were about to introduce, legislation either adopting the Model Law or addressing related electronic commerce facilitation issues. A number of those legislative proposals also dealt with electronic (or in some cases, specifically digital) signature issues.

B. Consideration of draft articles

Article 1. Sphere of application

22. The text of article 1 as considered by the Working Group was as follows:

"These Rules apply where electronic signatures are used in the context* of commercial** activities. They do not override any rule of law intended for the protection of consumers.

"* The Commission suggests the following text for States that might wish to extend the applicability of these Rules:

"These Rules apply where electronic signatures are used, except in the following situations: [...]".

"** The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

23. The Working Group generally agreed that draft article 1 as currently drafted was acceptable. It was adopted in substance, subject to possible reconsideration after review of the text by a drafting group to ensure consistency between the provisions of the Uniform Rules.

24. After discussion of draft article 1, the Working Group decided to postpone consideration of the definitions in draft article 2 until it had completed its review of the substantive provisions of the Uniform Rules.

Article 3. [Technology neutrality] [Equal treatment of signatures]

25. The text of article 3 as considered by the Working Group was as follows:

"None of the provisions of these Rules shall be applied so as to exclude, restrict, or deprive of legal effect any method [of *electronic* signature] [that satisfies the requirements *referred to in article 6(1) of these Rules*][*which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement*] [*or otherwise meets the requirements of applicable law*]."

26. An initial concern was raised as to the need for an article along the lines of draft article 3. It was pointed out that the original intention of the draft article was to ensure that signature technologies that could be demonstrated to meet the requirements of draft article 6 (1) should not be discriminated against, even if they could not be considered to be within the definition of enhanced electronic signatures. It was suggested that, if the distinction between electronic signatures and enhanced electronic signatures was not maintained in the Uniform Rules, draft article 3 might not be required

.

27. As to the title of draft article 3, one view was that "Technology neutrality" was preferable since it stated clearly a principle upon which it was agreed the Uniform Rules should be based. In support of that view, it was suggested that the phrase "Equal treatment" might lead to some confusion with the principle of non-discrimination set forth in draft article 13. Another view was that neither title properly described the content of draft article 3, which was that all technologies were to be given the same opportunity to satisfy the requirements of draft article 6. After discussion, the Working Group decided to combine both alternatives.

28. With regard to the first text in square brackets in draft article 3, "[of electronic signatures]", it was suggested that the Uniform Rules should refer consistently to either "a method" or "an electronic signature", but not to both, as that would not be consistent with the Model Law. Another view was that the reference should be to an "electronic signature", as that was the subject of the Uniform Rules. As a compromise, it was proposed that draft article 3 should refer to "any method of creating an electronic signature". That proposal received general support.

29. With regard to the second set of words in square brackets, there was general agreement that the formulation "that satisfies the requirements referred to in article 6 (1) of these Rules" was preferable to the formulation which set out in full the terms of article 7 (1) (b) of the

Model Law, as those words were already included in draft article 6 and did not need to be repeated in draft article 3.

30. Some concerns were expressed about the meaning of the final words in square brackets, "[or otherwise meets the requirements of applicable law.]". One view was that those words should be retained as they provided a degree of flexibility to the draft article and recognized the possibility of a standard which was lower than that set forth in article 7 of the Model Law (and draft article 6 of the Uniform Rules). A contrary view was that, if the parties agreed to use a higher standard than that approved by applicable law (assuming applicable law to reflect the terms of article 7 of the Model Law), it would not be covered by the current draft of article 3. Another view was that those words were too narrow and did not take sufficient account of the importance of trade practices and usages that might be relevant where, for example, a self-regulatory approach was adopted towards electronic signatures. A contrary view was that those trade practices and usages, if relevant, would be included within, or reflected by, applicable law and if they were not, they should have no application in the context of draft article 3. A further suggestion was that the reference to applicable law could be deleted, since any State adopting the Uniform Rules would always have to consider how the Uniform Rules would relate to existing law, which would clearly be the applicable law referred to in the draft article.

31. Another issue of concern with respect to draft article 3 was its relationship to draft article 5 and the concept of party autonomy. It was suggested that the opening words "None of the provisions of these Rules" could be construed as excluding the ability of parties to agree to something other than the requirements of draft article 6 (1), whether more or less than that standard. A contrary view was that that was not a correct interpretation of the two draft articles and draft article 3 would clearly be subject to draft article 5 unless otherwise stated in draft article 3. It was pointed out that the question of party agreement in any event was included in draft article 6 (1), which specifically referred to the need to consider all circumstances "including any relevant agreement" and could be included within the reference to applicable law. It was also suggested that that issue was one of drafting, not of substance, and could be addressed by reversing the order of draft articles 3 and 5, by including appropriate wording in either draft article 3 or draft article 5, or by ensuring that the relationship between draft articles 3 and 5 was explained clearly in a guide to enactment.

32. After discussion, the Working Group adopted the following text of the draft article subject to possible reconsideration after review of the text by a drafting group to ensure consistency between the provisions of the Uniform Rules:

> "None of these Rules, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirement referred to in article 6 (1) of these Rules or otherwise meets the requirements of applicable law."

Article 4. Interpretation

33. The text of draft article 4 as considered by the Working Group was as follows:

> "(1) In the interpretation of these Uniform Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.
>
> "(2) Questions concerning matters governed by these Uniform Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Uniform Rules are based."

34. The substance of draft article 4 was found generally acceptable. It was adopted subject to review of the text by a drafting group to ensure consistency between the various provisions

of the Uniform Rules and the various language versions.

35. In the context of the discussion of draft article 4, it was observed that the Uniform Rules should provide indication as to the principles on which they were based. For example, it was generally agreed that the principle of technology neutrality expressed in draft article 3 should be listed among the principles referred to in draft article 4. It was suggested that a preamble to the Uniform Rules, to be discussed for possible inclusion at a later stage, would be an appropriate place for stating such principles.

Article 5. [Variation by agreement] [Party autonomy] [Freedom of contract]

36. The text of draft article 5 as considered by the Working Group was as follows:

> "These Rules may be derogated from or [their effect may be] varied by agreement, unless otherwise provided in these Rules or in the law of the enacting State."

37. The Working Group discussed the title of draft article 5. It was generally agreed that, for reasons of consistency with article 4 of the Model Law, the title "Variation by agreement" should be adopted. "Party autonomy" and "Freedom of contact" were generally regarded as mere restatements of the general principles underpinning draft article 5.

38. As to the way in which the principle of party autonomy was expressed in draft article 5, various suggestions of a drafting nature were made. One suggestion was that the conjunction "and" was preferable to "or" to indicate that both derogation from and variation of the Uniform Rules were envisaged by the draft provision. Another suggestion was that reference should be made to "variation by agreement expressed or implied". After discussion, it was generally agreed that, to the extent possible, the wording of draft article 5 should be kept in line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations Sales Convention"). Appropriate explanations regarding variation by way of an implied agreement might be included in a guide to enactment of the Uniform Rules.

39. A suggestion was made that the Uniform Rules might include also wording drawn from articles 9 and 11 of the United Nations Sales Convention. The widely prevailing view, however, was that such provisions, which were needed in the text of an international convention, would be superfluous in uniform rules.

40. With respect to the words "unless otherwise provided in these Rules", it was generally agreed that the matter might need to be reconsidered after the Working Group had completed its review of the draft articles. Pending a decision as to whether the Uniform Rules would contain any mandatory provision, the words "unless otherwise provided in these Rules" should be placed within square brackets.

41. As to the words "unless otherwise provided in the law of the enacting State", the view was expressed that redrafting was necessary to avoid creating the impression that enacting States were encouraged to establish mandatory legislation limiting the effect of party autonomy with respect to electronic signatures. It was suggested that the words "unless the agreement is not otherwise enforceable under the law of the enacting State" might be used. Another suggestion was to express the principle of party autonomy without restriction and to introduce a new paragraph along the following lines: "The provisions of this article do not apply to the following: ...".

42. It was observed that, in some legal systems, the notion of an agreement being unenforceable would adequately cover all cases where public policy, mandatory law or court discretion might limit the effectiveness of a contract. However that notion was not readily used in all legal systems. It was generally agreed that the words "unless that agreement would not

be valid or effective under the law of the enacting State" were more appropriate.

43. After discussion, it was decided that, subject to review by a drafting group, draft article 5 should read along the lines of: "These Rules may be derogated from or their effect may be varied by agreement, unless [otherwise provided in these Rules or] the agreement would not be valid or effective under the law of the enacting State".

Article 6. [Compliance with requirements for signature] [Presumption of signing]

44. The text of draft article 6 as considered by the Working Group was as follows:

"(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if [a method] [an electronic signature] is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

"(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

Variant A

"(3) It is presumed that [a method] [an electronic signature] is reliable for the purpose of satisfying the requirement referred to in paragraph (1) if that method ensures that:

(a) the data used for the creation of an electronic signature are unique to the holder of the signature [creation] device within the context in which they are used;

(b) the holder of the signature [creation] device [has] [had at the relevant time] sole control of that device;

(c) the electronic signature is linked to the [information] [the data message or the part of that message] to which it relates [in a manner which guarantees the integrity of that information];

(d) the holder of the signature [creation] device is objectively identified within the context [in which the device is used] [of the data message].

Variant B

"(3) In the absence of proof to the contrary, the use of an electronic signature is presumed to prove:

(a) that the electronic signature meets the standard of reliability set out in paragraph (1);

(b) the identity of the alleged signer; and

(c) that the alleged signer approved the information to which the electronic signature relates.

"(4) The presumption in paragraph (3) applies only if:

(a) the person who intends to rely on the electronic signature notifies the alleged signer that the electronic signature is being relied upon [as equivalent to the handwritten signature of the alleged signer] [as proof of the elements listed in paragraph (3)]; and

(b) the alleged signer fails to notify promptly the person who issues a notification under subparagraph (a) of the reasons for which the electronic signature should not be relied upon [as equivalent to the handwritten signature of the alleged signer] [as proof of the elements listed in paragraph (3)].

Variant C

"(3) In the absence of proof to the contrary, the use of an electronic signature is presumed to prove:

(a) that the electronic signature meets the standard of reliability set out in paragraph (1);

(b) the identity of the alleged signer; and

(c) that the alleged signer approved the information to which the electronic signature relates.

"[(4)][(5)] The provisions of this article do not apply to the following: [...]."

General remarks

45. There was general agreement in the Working Group that the purpose of draft article 6 was to build upon article 7 of the Model Law and provide guidance as to how the test of reliability in article 7(1)(b) could be satisfied. It was also agreed that the means of achieving that result should be consistent with the terms of the Model Law.

Paragraphs (1) and (2)

46. There was considerable support for paragraphs (1) and (2) of draft article 6 as currently drafted, although some support was also expressed in favour of reproducing in draft article 6(1) the entire text of article 7(1) of the Model Law, as proposed in paragraph 41 of the note by the Secretariat (A/CN.9/WG.IV/WP.84). It was suggested that quoting more extensively from the Model Law would emphasize that the main goal of paragraph (1) was to deal with the case where any type of electronic signature (including "non-enhanced" methods of authentication) was used for signing purposes (i.e., with intent to create a functional equivalent of a handwritten signature). Since the substance of article 7(1)(a) of the Model Law was already included in the definition of "electronic signature" in draft article 2(a) of the Uniform Rules, it was noted that that approach would require the definition to be reconsidered.

47. It was widely felt, however, that repetition of the entire text of article 7 was not necessary in draft article 6, principally on the basis that the resulting text would be unnecessarily long and complex, and that the substance of article 7(1)(a) could be retained in the definition of "electronic signature" in the Uniform Rules.

48. As a matter of drafting, there was general support for including the reference to "an electronic signature" (currently in square brackets) as opposed to "a method". It was pointed out that since the subject of the Uniform Rules was electronic signatures, they should be referred to directly in draft article 6. A proposal that those two phrases could be merged to

reflect the text agreed in respect of draft article 3, "a method of creating an electronic signature", was not widely supported.

49. A proposal was made that draft article 6 should be based upon, and not detract from, three principles: first, the reliability test set forth in article 7(1)(b) of the Model Law; secondly, the importance of party agreement, as currently reflected in draft article 5 and the last words of draft article 6(1); and thirdly, the possibility that applicable law could mandate the use of a particular form of signature technique, as currently reflected in draft article 8. It was also proposed that the text referred to in paragraph 42 of the note by the Secretariat (A/CN.9/WG.IV/WP.84) under which "the legal consequences of the use of a signature shall apply equally to the use of electronic signatures" should also be incorporated. The following text was suggested to reflect those principles:

> "6(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
>
> (a) an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all relevant circumstances; or
>
> (b) the parties to a contract agree on the form of electronic signature to be used and do, in fact, use that form of electronic signature; or
>
> (c) the terms of the applicable law mandate a form of electronic signature and that form of electronic signature is, in fact, used.
>
> "6(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.
>
> "6(3) The legal consequences of the use of a signature shall apply equally to the use of an electronic signature which meets the requirements of paragraph (1)."

50. With reference to the drafting of that proposal, one concern expressed was that the use of the word "contract" in proposed paragraph (1)(b) was too narrow and did not reflect the broader concept included in the current formulation of draft article 5, that is, one which did not restrict the nature of the agreement referred to and did not mention the parties between whom that agreement might be reached. It was also suggested that paragraph (2) should include, in addition to a reference to "mandating" the use of a form of electronic signature, a reference to applicable law "permitting" the use of a particular form of signature. Some concern was also expressed as to the reference to a "form of signature" and it was clarified that what was intended was a "method" of signature.

51. As to the substance of the proposal, it was suggested that paragraph (1)(b) should be left to draft article 5, since it might lead to some confusion if included within draft article 6 and result in a more narrow interpretation of the principle of party autonomy than was intended by the Working Group. It was also questioned whether paragraph (1)(b) would allow parties to use a method of signature that was more reliable than a method which they had previously agreed upon. To address that issue, it was proposed that the paragraph should refer to "a method at least as reliable as the method agreed upon". It was also suggested that paragraph (1)(c) did not need to be stated, since it was clear that any State could adopt such an approach if it chose to do so, and that paragraph (3) was superfluous as it was simply a restatement of the effect of paragraph (1). The concern was also expressed that the reference to the consequences of the use of a signature might lead to a broad interpretation which might not be appropriate with respect to all the consequences of the use of a handwritten signature. By way of illustration, the example was given of certain evidentiary provisions relating to the proof of a

handwritten signature which could not easily be transposed for electronic signatures.

52. It was observed that the proposal, particularly paragraph (1)(c), might be useful in addressing the situation where the rule of conflicts suggested that the applicable law would be law other than that of the enacting State. It was suggested that if all three subparagraphs of paragraph (1) were not to be retained, the draft article could be interpreted as presupposing that all countries had adopted the Model Law, which might not be the case. For that reason, it was suggested that paragraph (1)(c) should be retained in order to address possible questions of conflict. After further discussion, however, the proposal did not receive wide support.

53. The Working Group agreed that paragraphs (1) and (2) of draft article 6 as currently drafted should be adopted, with the phrase "an electronic signature" subject to possible reconsideration after review by a drafting group to ensure consistency between the provisions of the Uniform Rules. The Working Group proceeded to consider the definition of "electronic signature" set forth in draft article 2(a).

Definition of "electronic signature" – draft article 2(a)

54. The Working Group considered whether the definition of "electronic signature" in the Uniform Rules should follow drafting which reflected the terms of article 7 of the Model Law, or whether it might be possible to adopt a different formulation.

55. It was proposed in draft article 2(a): that the words in square brackets referring to "data in electronic form" should be adopted in preference to the words "any method in relation to a data message", with the phrase "attached to" substituted for "affixed to"; and that the remainder of the definition following the words currently in square brackets should read "that identifies the signatory and purports to indicate the signatory's intention to approve or associate itself with the information contained in the data message". It was also proposed that, since the term "identification" could be broader than mere identification of a person by name, the following sentence should be added to the definition by way of clarification: "For the purposes of this definition, identification of the signatory includes distinguishing him or her, by name or otherwise, from any other person."

56. The view was expressed, however, that drafting which reflected the terms of the Model Law should be closely followed, since adopting the language proposed in paragraph 55 above amounted to unnecessary modification of the Model Law and did not assist the Working Group in addressing the key purpose of draft article 6, which was currently set forth in the variants of paragraph (3). It was also pointed out that the question of the meaning of "identification" had been raised in paragraph 32 of the note by the Secretariat (A/CN.9/WG.IV/WP.84) and might appropriately be reflected in a guide to enactment of the Uniform Rules.

57. After discussion, the Working Group adopted the following text of the definition, subject to possible reconsideration to ensure consistency between the provisions of the Uniform Rules:

> "Electronic signature" means any method that is used to identify the signature holder in relation to the data message and indicate the signature holder's approval of the information contained in the data message."

58. The Working Group agreed that the meaning of the term "identification" should be addressed in a guide to enactment along the lines of the last sentence of paragraph 55 above and paragraph 32 of the note by the Secretariat (A/CN.9/WG.IV/WP.84).

Paragraph (3)

59. General support was expressed in favour of variant A.

Opening words

60. It was widely felt that paragraph (3) was an essential provision if the Uniform Rules were to meet their goal of providing more certainty than readily offered by the Model Law as to the legal effect to be expected from the use of particularly reliable types of electronic signatures. It was recalled that paragraph (1), to the extent it reproduced article 7(1) of the Model Law, dealt with the determination of what constituted a reliable method of signature in the light of the circumstances. Such a determination could only be made under article 7 of the Model Law by a court or other trier of fact intervening ex post, possibly long after the electronic signature had been used. In contrast, the benefit expected from the Uniform Rules in favour of certain techniques, which were recognized as particularly reliable, irrespective of the circumstances in which they were used, was to create certainty (through either a presumption or a substantive rule), at or before the time any such technique of electronic signature was used (ex ante), that using such a recognized technique would result in legal effects equivalent to those of a handwritten signature (A/CN.9/WG.IV/WP.84, para. 43).

61. Divergent views were expressed as to the form in which the rule contained in paragraph (3) should be expressed. One view was that establishing a presumption was the most appropriate way of drawing attention to the expected result of paragraph (3), namely to establish certainty with respect to the use of a certain signature technique by requiring the party who wished to challenge the type of electronic signature envisaged in paragraph (3) to produce evidence as to the lack of reliability of that signature. Another view was that establishing a presumption might raise difficult questions regarding the level of the presumption and the means by which it could be rebutted. It was observed that the Uniform Rules might not be an appropriate instrument to attempt any harmonization of procedural law. Yet another view was that paragraph (3) should not be in the form of a rule, whether a rule of evidence or a substantive rule, but that it should merely list a number of factors to be taken into account when assessing the reliability of a given signature technique. That view was objected to on the grounds that, if paragraph (3) were merely to list a number of factors, it would add little value or certainty to article 7 of the Model Law, which was already accompanied by a list of factors in paragraph 58 of the Guide to Enactment.

62. The prevailing view was that, in order to provide certainty as to the legal effect resulting from the use of what might or might not be called an "enhanced electronic signature" under draft article 2, paragraph (3) should not merely list certain factors to be taken into account when assessing the reliability of an electronic signature. Instead, it should expressly establish the legal effects that would result from the conjunction of certain technical characteristics of an electronic signature. As to how those legal effects would be established, it was agreed that enacting States, depending on their law of civil and commercial procedure, should be free to adopt a presumption or to proceed by way of a direct assertion of the linkage between certain technical characteristics and the legal effect of a signature. It was agreed that wording along the following lines should be adopted:

> "An electronic signature is considered to be reliable for the purpose of satisfying the requirements referred to in paragraph (1) if ..."

It was suggested that additional words might be necessary to avoid the possible misinterpretation of paragraph (3) as affecting the operation of the general rule contained in paragraph (1). While paragraph (3) would appropriately offer the benefit of certainty (which was also described as establishing a "safe haven" rule), it should not prevent parties from demonstrating that electronic signatures that did not fall under paragraph (3) could also satisfy the requirements in paragraph (1). Another suggestion was that, in order to avoid creating an irrebuttable presumption, paragraph (3) should be made subject to evidence being produced to demonstrate that a given use of an electronic signature under paragraph (3) should not in fact result in that electronic signature being treated as reliable. Those two suggestions were adopted by the Working Group. The matter was referred to the drafting group.

Variant A, paragraph 3(a)

63. Some doubts were expressed about the signature creation device being "unique" to the signature device holder. From a technical point of view it was suggested that the device could be "uniquely linked", but not "unique"; the linkage between the data used for creation of the signature and the device holder was the essential element. The following formulation was suggested for subparagraph (a):

> "(a) the data used for creation of the electronic signature are linked, within the context in which they are used, to the signatory and to no other person".

64. Concern was expressed that subparagraph (a) might mean that the signature device could be linked to different signatories in different contexts.

65. As a matter of drafting, it was proposed that the opening phrase of subparagraph (a) should be "the means of creating the electronic signature". The Working Group adopted subparagraph (a) as proposed (see para. 63 above) with that amendment.

Variant A, paragraph (3)(b)

66. One concern expressed in relation to the phrase "sole control" was how it would affect the ability of the holder of the signature device to authorize another person to use the signature on the holder's behalf. A related concern was use of the signature device in the corporate context where the corporate entity would be the signature holder but would require a number of persons to be able to sign on its behalf. It was suggested that that issue could be addressed by deleting the word "sole" and including, in addition to the reference to the holder of the signature device, the words "and any authorized signatory".

67. A further view in support of the deletion of "sole" was that it was a restrictive requirement which might exclude existing business applications such as the one where the signature device existed on a network and was capable of being used by a number of people. It was pointed out, however, that that situation could still operate within the concept of "sole control"; the network would presumably relate to a particular entity which would be the signature holder and thus capable of maintaining control over it. If that was not the case, and the signature device was widely available, it should not be covered by the rules.

68. In support of retaining the concept of "sole", the view was expressed that it was essential to ensure that the signature device was capable of being used by only one person at any given time, principally the time at which the signature was created, and not by some other person as well. It was suggested that the question of agency or authorized use of the signature device should be addressed in the definition of "signature holder", not in the substance of the rules. To address the concerns expressed, the following text was suggested:

> "(b) the means of creating the electronic signature was, at the relevant time, under the control of the signatory and no other person".

69. Some concern was expressed as to the meaning of the words "at the relevant time". It was pointed out that it was essential to retain this concept because the means of creating the signature might include both software and hardware, and the latter might be used by a number of persons to create signatures, so that it needed to be made clear that the signatory had control of those means at the time the signature was created. It was suggested that this could be clarified by stating that the relevant time was the "time of signing". Another suggestion was that since the time of generation of the signature might also be a "relevant time", the phrase could read: "at the time the signature was both generated and used". It was pointed out that, although it might be possible for the time of signing to differ from technology to technology, it would always be a question of fact.

70. A contrary view was that since it would be difficult to prove the exact time of signing, the concept of "relevant time" should be deleted. In response, it was pointed out that deleting any reference to time merely begged the question of whether the signatory had control of the means of creating the signature at all times relevant to the issue in question.

71. After discussion, the Working Group agreed to adopt the phrase "at the time of signing".

Variant A, paragraph (3)(c)

72. The view was expressed that it was essential for paragraph (3)(c) to include the notion of a guarantee of integrity of the information in the data message, since a signature which provided such a guarantee would clearly be a reliable signature within the meaning of draft article 6(1). Where a signature was attached to a document, the integrity of the document and the integrity of the signature were so closely related that it was not possible to conceive of one without the other. In other words, where a signature was used to sign a document, the idea of the integrity of the document was inherent in the use of the signature. It was also noted that the idea of the integrity of the document was closely linked to the use of the signature to signify approval of the content of the document.

73. A contrary view, based upon the distinction drawn in the Model Law between articles 7 and 8, was that, although some technologies provided both authentication (article 7) and integrity (article 8), those concepts could be seen as distinct legal concepts and were treated as such in the Model Law. Since a handwritten signature provided neither a guarantee of the integrity of the document to which it was attached nor a guarantee that any change made to the document would be detectable, the functional equivalence approach required that those concepts should not be added to paragraph (3)(c). The purpose of paragraph (3)(c) was to set forth the criteria to be met in order to demonstrate that a particular method of signature was reliable enough to satisfy a requirement of law for a signature. It was suggested, in support of that view, that requirements of law for a signature could be met without having to demonstrate the integrity of the document. It was noted, however, that the issue of integrity should not be deleted from the Uniform Rules, but should be addressed in the context of draft article 7; in that way signatures could satisfy draft article 6 or draft article 7, or both, depending upon what requirement of law was to be satisfied.

74. It was observed that including the requirement for integrity of the information in draft article 6 suggested the use of one particular technology, which would be inconsistent with the principle of technology neutrality. It was suggested that the use of one particular technology would be too restrictive and would hamper, rather than promote, the use of electronic signatures in a number of countries. In addition, it might create a signature which was more reliable than a handwritten signature and thus go beyond the concept of functional equivalence, possibly prejudicing the use of handwritten signatures.

75. The view was expressed that, although the link between the signature and the data message was clearly required and integrity of the signature was important, those requirements could be distinguished from a requirement of integrity of the information in the data message. A contrary view was that integrity of the signature was not an issue that needed to be addressed and, in any event, could not be separated from a consideration of the integrity of the signed information. It was proposed, however, that the integrity of the signature could be addressed as follows:

> "(c) the electronic signature is linked to the information to which it relates in a manner such that any alteration to the electronic signature, made after its creation, is detectable".

76. That proposal received general support.

77. The view was expressed that, as an alternative to a general requirement that the signature technique used must be able to guarantee the integrity of the document, the notion of integrity of the document could be included as a criterion to be satisfied only in circumstances where that guarantee was the focus of the signature requirement. One proposal was made to address the integrity of the signature and of the information in the data message as separate ideas, by adding works "or to the data message" after the words "to the electronic signature". A further proposal was that the issue of detecting an alteration of the signature should be included in paragraph (3) as proposed in paragraph 75 above, with a separate, additional article reading as follows:

> "Where the law requires a signature to give assurance as to the integrity of information in a document, that requirement is met in relation to a data message by the use of an electronic signature which is linked to the data message in such a manner that any subsequent alteration of the information in the data message would be detectable".

78. The view was expressed that that provision should not be included in a separate provision because it ought to be clear that draft article 6(3) would not be met if one of the reasons for the requirement of a signature was to provide assurance as to the integrity of the document. It was observed that the words "where the law requires a signature to give assurance" might require an inquiry into the reasoning behind the requirement, which would invariably prove difficult. To resolve that difficulty, the provision should be formulated in the negative, along the following lines, and be included as a second sentence in paragraph (3)(c), as follows:

> "(c) the electronic signature is linked to the information to which it relates in a manner such that any alteration to the electronic signature, made after its creation, is detectable. Where the law requires a signature to support the integrity of a signed document, that requirement of integrity is not satisfied unless the electronic signature permits detection of any alteration of the document".

79. Support was expressed in favour of those proposals on the basis that they might satisfy both the situations where integrity of the document was required and those where the signature was required without any reference to integrity. It was suggested, however, that the provision might be more effective if formulated as a proviso, as follows:

> "(c) the electronic signature is linked to the information to which it relates in a manner such that any alteration to the electronic signature, made after its creation, is detectable, provided that, where the purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information in the document, it shall be necessary to establish also that the electronic signature is linked to the data message in a manner ensuring that any alteration made to the data message after creation of the electronic signature is detectable".

80. As between the two proposals, support was expressed in favour of the form drafted as a proviso because it focused upon the purpose of the legal requirements being to provide integrity rather than upon situations where the law required the signature to assure integrity, which might be more difficult to ascertain. It was suggested, however, that the reference should be to "a purpose" rather than "the purpose". A suggestion to delete the reference to a "requirement of law" and simply to refer to any situation where a signature was used for the purpose of assuring integrity was not supported. It was pointed out that, since the overall purpose of draft article 6 was to address requirements of law for a signature, that limitation could not be removed from paragraph (3)(c). After discussion of a number of other suggestions of a drafting nature, the following text was adopted:

> "(c) any alteration to the electronic signature, made after its creation, is detectable and, where a purpose of the legal requirement for a signature is to provide assurance as

to the integrity of the information in the data message, any alteration made to the data message after the time of signing is detectable;"

Variant A, paragraph (3)(d)

81. Some concern was expressed as to the meaning of the word "objective". One view was that that standard of identification might be rather difficult to satisfy in all cases, especially where the context or the content of the signature might be sufficient without requiring what would amount to "objective" or external confirmation of the identity of the signature holder. Another view was that the importance of the requirement was not the actual identification of the signature holder, but that the technology should be capable of objectively identifying the signature holder.

82. The view was expressed that the inclusion in the definition of "electronic signature" of a requirement that the signature be used to identity the signature holder made the inclusion of paragraph (3)(d) in article 6 unnecessary. In support of that view it was noted that, while the idea of objective identification had been included in some national electronic signature laws, that had been in the context of presumptions of identity, not in relation to the reliability of the method of signature. It was noted that it would be hard to envisage a situation where subparagraphs (a) to (c) of paragraph (3) were satisfied by a particular method of signature which did not also satisfy subparagraph (d).

83. After discussion, the Working Group agreed that paragraph (3)(d) should be deleted.

84. At the close of the discussion of paragraph (3), the view was expressed that draft article 6 might need to be redrafted to indicate that any presumption arising from the combination of the elements listed in subparagraphs (a) to (c) might also arise from determination by the parties in any relevant agreement that a given signature technique would be treated among themselves as a reliable equivalent of a handwritten signature. Some support was expressed in favour of that view. Various drafting suggestions were made in that respect. One suggestion, based on article 4 of the Model Law, was to insert the following wording as a separate paragraph or as a subparagraph of paragraph (3): "This article does not affect any right that may exist to establish by agreement the reliability of an electronic signature to satisfy the requirement referred to in paragraph (1)." Another suggestion, geared to the situation where parties would agree on the use of a standard higher than the one expressed in paragraph (3), was to introduce language along the following lines: "Nothing in paragraph (3) shall prevent enforceability as between the parties of standards of reliability higher than those referred to in paragraph (1)." A related proposal read as follows: "Nothing in paragraph (3) shall permit a person to satisfy the requirement referred to in paragraph (1) where that person has agreed to meet a higher standard of reliability which has in fact been met." The last two suggestions were objected to on the grounds that the issues of contractual liability faced by a party who failed to meet a higher standard to which it had agreed should not be dealt with in draft article 6, but under the law governing contractual liability outside the Uniform Rules.

85. The prevailing view was that draft article 5 sufficiently expressed the possibility for parties to derogate from the provisions of the Uniform Rules. It was agreed that renewing the expression of party autonomy in the context of draft article 6 might be repetitious and inappropriately suggest that parties were free to modify, as between themselves, any mandatory requirement of law with respect to the use of a signature.

86. Yet another suggestion was made to introduce additional wording in draft article 6 to address the situation where the reliability of an electronic signature would be presumed as a result of a determination by a State authority under draft article 8. It was generally felt that such a situation was sufficiently dealt with in draft article 8. That suggestion was not supported by the Working Group.

Paragraph (4)

87. There was general agreement that a provision along the lines of paragraph (4), based on a similar provision in various articles of the Model Law ("The provisions of this article do not apply to the following: ..."), should be included in draft article 6.

Article 7. Presumption of original

88. The text of draft article 7 as considered by the Working Group was as follows:

"(1) A data message is presumed to be in its original form where, in relation to that data message, [a method] [an electronic signature] [within article 6] is used which:

(a) provides a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented;

"(2) The provisions of this article do not apply to the following: [...]."

89. In view of the decision to deal in draft article 6 (3) with the situation where an electronic signature was used to meet a legal requirement for integrity of the information contained in a document, it was generally agreed that it would be superfluous to address that same situation from the perspective of the "originality" of the document. After discussion, the Working Group decided that draft article 7 should be deleted.

Article 8. Satisfaction of articles 6 and 7

90. The text of draft article 8 as considered by the Working Group was as follows:

"*Variant A*

"(1) *[The organ or authority specified by the enacting State as competent]* may determine which methods satisfy the requirements of articles 6 and 7.

"(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

"*Variant B*

"(1) One or more methods of electronic signature may be determined as satisfying the requirements of articles 6 and 7.

"(2) Any determination made under paragraph (1) shall be consistent with recognized international standards."

91. Some support was expressed in favour of variant B on the grounds that it did not emphasize the role of State authorities in making a determination as to which types of electronic signatures would be presumed to satisfy legal requirements for signatures. The prevailing view, however, was that the discussion should proceed on the basis of variant A, which was more descriptive of the role necessarily played by the enacting State in establishing or recognizing any entity that might validate the use of electronic signatures or otherwise certify their quality. In order not to suggest that such entities would always have to be established as State authorities, it was generally agreed that the opening words of paragraph

(1), "[The organ or authority specified by the enacting State]", should be replaced by wording along the following lines: "[The person, organ or authority, whether public or private, specified by the enacting State]".

92. A question was raised as to whether the reference in draft article 8 to draft article 6 should be made more specific. Support was expressed for referring to "the requirement of article 6(1)", since paragraph (1) of article 6 was said to contain the broadest expression of a legal requirement for a signature. The prevailing view, however, was that draft article 8 should not refer to any specific paragraph of draft article 6. When making a determination with respect to the satisfaction of requirements for signature, the competent persons or authorities should be free to refer to article 6(1) or to article 6(3).

93. With respect to paragraph (2), concern was expressed as to the meaning of the words "recognized standards". Consistent with the interpretation suggested at its previous session (see A/CN.9/465, para. 94), the Working Group decided that the word "standard" needed to be interpreted in a broad sense, which would include industry practices and trade usages, legal texts emanating from international organizations, as well as technical standards. It was also decided that the guide to enactment of the Uniform Rules should make it clear that the possible lack of relevant standards should not prevent the competent persons or authorities from making the determination referred to in paragraph (1).

94. It was suggested that an additional paragraph should be introduced in draft article 8 to make it abundantly clear that the purpose of the draft article was not to interfere with the normal operation of the rules of private international law. It was stated that, in the absence of such a provision, draft article 8 might be misinterpreted as encouraging enacting States to discriminate against foreign electronic signatures on the basis of non-compliance with the rules set forth by the relevant person or authority under paragraph (1). The following text was proposed: "(3) Nothing in this article affects the operation of the rules of private international law." That proposal was generally supported.

95. After discussion, the Working Group adopted draft article 8 subject to the above changes and referred it to the drafting group.

Article 9. Responsibilities of the signature device holder

96. The text of draft article 9 as considered by the Working Group was as follows:

"(1) Each signature device holder shall:

(a) exercise reasonable care to avoid unauthorized use of its signature device;

(b) notify appropriate persons without undue delay if:

(i) the signature device holder knows that the signature device has been compromised; or

(ii) the circumstances known to the signature device holder give rise to a substantial risk that the signature device may have been compromised;

(c) [Where a certificate is used to support the signature device,] [Where the signature device involves the use of a certificate,] exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signature device holder which are relevant to [the life-cycle of the] certificate, or which are to be included in the certificate.

"(2) A signature device holder shall be liable for its failure to satisfy the requirements of paragraph (1)."

Title

97. Concerns were expressed as to the use of the word "responsibilities" in the title of the draft article. It was suggested that that term was too vague since it did not clearly reflect the subject of the draft article, which was the obligations or duties of the signatory. It was recalled that the Working Group had discussed a number of problems raised by the use of the words "duty" and "obligation" at previous meetings, and that "responsibilities" had been widely regarded, at the time, as a less controversial term. It was proposed that, since the purpose of the draft article was to establish a code of conduct for signatories, the title could be "Conduct of signatory". After discussion, that proposal was widely accepted.

Paragraph (1)

98. At the outset, the Working Group discussed the scope of application of paragraph (1). The view was expressed that subparagraphs (a) and (b) should apply generally to all electronic signatures, while subparagraph (c) would only apply to electronic signatures supported by a certificate. In support of that view it was noted that the obligation in paragraph (1) (a), in particular, to exercise reasonable care to prevent unauthorized use of a signature device did not establish an obligation that was unfamiliar and it was, in fact, generally contained in agreements concerning the use of credit cards. A contrary view was that care should be taken in establishing standards of conduct in areas where technology was developing, since those new standards might change existing rules and lead to unintended consequences. It might not be appropriate to apply paragraph (1) (a) more widely than to electronic signatures that might, for example, satisfy draft article 6 (3). In response to that view, it was noted that the provision for variation by agreement in draft article 5 would allow the standards set in draft article 9 to be varied in areas where they were thought to be inappropriate, or where they led to unintended consequences. In response to a further concern as to the application of the Uniform Rules to consumers and the effect of the standard of reasonable care, it was recalled that the Uniform Rules were not intended to overrule laws designed for the protection of consumers.

99. After discussion, the Working Group agreed that subparagraphs (a) and (b) should apply generally to all signatures, and that subparagraph (c) should apply only to signatures supported by certificates. It was noted that a broad application of subparagraphs (a) and (b) would need to be borne in mind when discussing the definition of "signature device holder" or "signatory".

100. With respect to paragraph (1) (b), concern was expressed as to the meaning of the words "appropriate person". It was questioned whether it was obvious with respect to all technologies that there would be an appropriate person who should be notified. One view was that it was clear that "appropriate" referred not only to persons who might seek to rely on the signature, but also to persons such as certification service providers, certificate revocation service providers and others. A further view was that the identity of the appropriate person would be covered by the contractual context of the signature use. To address those concerns, it was proposed that the reference to "appropriate persons" should be replaced by wording along the following lines:

"Without undue delay, notify persons who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature".

That proposal was widely supported.

101. With respect to paragraph (1) (c), support was expressed in favour of retaining the words first appearing in square brackets, "Where a certificate is used to support the signature device", without the square brackets, and removing the brackets from the words "the life-cycle

of the certificate". It was suggested that the meaning of that phrase should be clearly explained in the guide to enactment. As to the application of paragraph (1) (c), concern was expressed as to the type of certificate covered by that provision. One view was that it might not be appropriate to apply the provision to both low-cost and high-cost certificates, since the duty of care might be excessive in relation to the former. A contrary view was that the standard of "reasonable care" would ensure that the appropriate level of care was applied to all different types of certificates.

Paragraph (2)

101. Concerns were expressed as to the need to retain paragraph (2) in the draft article. One view was that, as currently drafted, paragraph (2) should be deleted as it added nothing to the draft article. It did not specify either the consequences or the limits of liability, both of which were left to national law. A contrary view was that paragraph (2), even though it left the consequences of liability up to national law, did serve to give a clear signal to enacting States that liability should attach to a failure to satisfy the obligations set forth in paragraph (1). It was noted that paragraph 53 of the note by the Secretariat (A/CN.9/WG.IV/WP.84) provided a useful explanation of paragraph (2) and should be included in the guide to enactment.

102. One proposal to amend paragraph (2) was intended to express more clearly that there was to be liability for failure to satisfy paragraph (1) and that the limits of liability were to be determined by the enacting State:

> "The legal consequences of the signature holder's failure to satisfy the requirements of paragraph (1) shall be determined by the enacting State."

103. A further proposal was to retain the existing text of paragraph (2) and to clarify its intent by adding in square brackets the words [*The limits and conditions of liability are to be determined by the enacting State.*]. Neither of those two proposals were supported.

104. A further proposal was to add a test of foreseeability to paragraph (2), in the same manner as the current text of draft article 10. It was observed that that test was increasingly accepted in international trade and would serve to establish an agreed standard for liability. It was recalled, however, that such a test had been proposed at a previous session of the Working Group, but had not received support. That proposal was not pursued. After discussion, the Working Group agreed to adopt the existing text of paragraph (2).

Article 10. Responsibilities of a supplier of certification services

105. The text of draft article 10 as considered by the Working Group was as follows:

> "(1) A supplier of certification services shall:
>
> (a) act in accordance with the representations it makes with respect to its practices;
>
> (b) exercise due diligence to ensure the accuracy and completeness of all material representations made by the supplier of certification services that are relevant to the life-cycle of the certificate or which are included in the certificate;
>
> (c) provide reasonably accessible means which enable a relying party to ascertain:
>
> (i) the identity of the supplier of certification services;
>
> (ii) that the person who is identified in the certificate holds, at the

relevant time, the signature device referred to in the certificate;

(iii) the method used to identify the signature device holder;

(iv) any limitations on the purposes or value for which the signature device may be used; and

(v) whether the signature device is valid and has not been compromised;

(d) provide a means for signature device holders to give notice that a signature device has been compromised and ensure the operation of a timely revocation service;

(e) utilize trustworthy systems, procedures and human resources in performing its services.

"(2) In determining whether and the extent to which any systems, procedures and human resources are trustworthy for the purposes of subparagraph (e) of paragraph (1), regard shall be had to the following factors:

(a) financial and human resources, including existence of assets within the jurisdiction;

(b) trustworthiness of hardware and software systems;

(c) procedures for processing of certificates and applications for certificates and retention of records;

(d) availability of information to the [signers][subjects] identified in certificates and to potential relying parties;

(e) regularity and extent of audit by an independent body;

(f) the existence of a declaration by the State, an accreditation body or the supplier of certification services regarding compliance with or existence of the foregoing;

(g) susceptibility to the jurisdiction of courts of the enacting State; and

(h) the degree of discrepancy between the law applicable to the conduct of the supplier of certification services and the law of the enacting State.

"(3) A certificate shall state:

(a) the identity of the supplier of certification services;

(b) that the person who is identified in the certificate holds, at the relevant time, the signature device referred to in the certificate;

(c) that the signature device was effective at or before the date when the certificate was issued;

(d) any limitations on the purposes or value for which the certificate may be used; and

(e) any limitation on the scope or extent of liability which the supplier of certification services accepts to any person.

"*Variant X*

"(4) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).

"(5) Liability of the supplier of certification services may not exceed the loss which the supplier of certification services foresaw or ought to have foreseen at the time of its failure in the light of facts or matters which the supplier of certification services knew or ought to have known to be possible consequences of the supplier of certification services' failure to [fulfil the obligations [duties] in][satisfy the requirements of] paragraph (1).

"*Variant Y*

"(4) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).

"(5) In assessing the loss, regard shall be had to the following factors:

(a) the cost of obtaining the certificate;

(b) the nature of the information being certified;

(c) the existence and extent of any limitation on the purpose for which the certificate may be used;

(d) the existence of any statement limiting the scope or extent of the liability of the supplier of certification services; and

(e) any contributory conduct by the relying party.

"*Variant Z*

"(4) If damage has been caused as a result of the certificate being incorrect or defective, a supplier of certification services shall be liable for damage suffered by either:

(a) a party who has contracted with the supplier of certification services for the provision of a certificate; or

(b) any person who reasonably relies on a certificate issued by the supplier of certification services.

"(5) A supplier of certification services shall not be liable under paragraph (2):

(a) if, and to the extent, it included in the certificate a statement limiting the scope or extent of its liability to any relevant person; or

(b) if it proves that it [was not negligent][took all reasonable measures to prevent the damage]."

Paragraph (1)

106. A suggestion of a drafting nature was that paragraphs (1)(c) and (3) should be merged, with some criteria being identified as essential for inclusion in the certificate and others to be

included in the certificate or otherwise made available or accessible to the relying party, where they would be relevant to a particular certificate. The factors proposed as essential for inclusion in the certificate (to be set forth in paragraph (1)(c)) were those in paragraph (1)(c)(i) and (ii) and paragraph (3)(c). The remainder of paragraphs (1)(c) and (3) was proposed for inclusion in the second category, to be set forth in a new paragraph (1)(d). That proposal was widely supported.

107. Some concern was expressed as to whether paragraph (3)(e), dealing with limitations on the liability of the certification services supplier, should be included in the second category of criteria or in the certificate itself. One view was that such a limitation should be clearly included in the certificate. A contrary view was that, since technology was developing in such a way that the amount of information that could be included in the certificate was very limited, to include the information required in paragraph (3)(c) to (e) might be out of step with technology and therefore unsustainable. It was observed that the approach of article 5bis of the Model Law, which addressed incorporation by reference, might offer a solution to the difficulty of limited space in the certificate. What would be required would be a reference to the existence of the limitation and an indication of where the precise terms could be found. After discussion, it was agreed that paragraph (3)(e) should be included in the second category of information in a new paragraph (1)(d).

108. Further suggestions of a drafting nature were: (a) to replace the reference to "due diligence" in paragraph (1)(b) with "reasonable care"; (b) to replace "ensure" in paragraph (1)(b) with "validate" or "verify"; (c) to add a reference to a certificate to paragraph (1)(c)(iv) so that limitations on purpose and value would relate to both signatures and certificates; and (d) to clarify the reference to "valid" in paragraph (1)(c)(v) by substituting the word "operational". With the exception of the proposal to change the reference to "ensure" in (b) above, those proposals received wide support.

109. It was observed that since representations by the supplier of certification services might relate not only to its practices, but also to its policy statements, a reference to policy should be included in paragraph (1)(a). That proposal was widely supported.

110. Some concern was expressed as to the meaning of paragraph (1)(c)(ii). It was observed that it would be difficult for the supplier of certification services to make available to a relying party information which showed that the person identified in the certificate was the holder of the signature device at any relevant time. It was suggested that that notion should be replaced by the notion of control in article 6(3) as follows:

> "(ii) that the person who is identified in the certificate had control of the signature device at the time of signing;"

111. It was observed that the reference in paragraph (1)(d) might not be appropriate for some certificates, such as transactional certificates, which are one-time certificates, or low-cost certificates for low-risk applications, both of which might not be subject to revocation. To satisfy that concern, it was proposed that paragraph (1)(d) should be expressed not as a requirement, but as a statement that a timely revocation service existed and that a means of providing notice as to compromise of the signature device existed. Information in respect of both of those elements could be included in a new paragraph (1)(d) (as proposed in para. 2 above) as follows:

> "(d) (v) whether a means exists for the signatory to give notice that a signature device has been compromised;
>
> "(d) (vi) whether a timely revocation service is offered;"

112. While that proposal was widely supported, it was observed that, since paragraph (1)(d) imposed an obligation on the supplier of certification services in respect of the signatory, that notion might need to be retained in draft article 10(1) in addition to the information proposed for addition to a new paragraph (1)(d), which would be relevant to relying parties. It was agreed that paragraph (1)(d) should be retained in addition to the text proposed for subparagraphs (d)(v) and (d)(vi).

113. After discussion, the Working Group decided that paragraph (1) should read along the following lines, subject to revision by a drafting group to ensure consistency of the various provisions and language versions:

"(1) A supplier of certification services shall:

(a) act in accordance with representations it makes with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by the supplier of certification services that are relevant to the life-cycle of the certificate or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain in the certificate:

(i) the identity of the supplier of certification services;

(ii) that the person who is identified in the certificate has control of the signature device at the time of signing;

(iii) that the signature device was effective as of or before the date when the certificate was issued;

(d) provide reasonably accessible means to enable a relying party to ascertain in the certificate or otherwise where relevant:

(i) the method used to identify the signatory;

(ii) any limitations on the purposes or value for which the signature device of the certificate may be used;

(iii) whether the signature device is operational and has not been compromised;

(iv) any limitation on the scope or extent of liability which the supplier of certification services accepts to any person;

(v) whether means exist for the signatory to give notice that a signature device has been compromised;

(vi) whether a timely revocation service is offered;

(e) Provide a means for a signatory to give notice that a signature device has been compromised and ensure the operation of a timely revocation service;

(f) Utilize trustworthy systems, procedures and human resources in performing its services."

Paragraph (2)

114. The view was expressed that paragraph (2) provided guidance which was important for inclusion in the text of the Uniform Rules, but that it should set forth a non-exhaustive list of factors to be taken into account in determining trustworthiness. It was observed that, as there was currently a lack of guidance available on issues such as those addressed in paragraph (2), the inclusion of the paragraph in draft article 10 would provide useful assistance.

115. A contrary view, which received substantial support, was that paragraph (2) should be deleted for a number of reasons: first, that it was inappropriate to include such a technical list in a legislative text; secondly, that it was likely to cause problems of interpretation; and thirdly, that the notion of trustworthiness could vary depending upon what was expected of the certificate and it might not, therefore, be appropriate to formulate a single list of criteria that would apply to all possible situations. It was proposed that the content of paragraph (2) should be included in a guide to enactment as factors indicating the trustworthiness of the certification services supplier.

116. In response to the proposal to delete paragraph (2), it was recalled that the purpose of including the paragraph in the current draft of article 10 was to ensure that any assessment of the trustworthiness of foreign certificates under draft article 13 could be made upon the basis of the same criteria as would apply to domestic certificates under draft article 10, ensuring equality of treatment. In response to that view, it was questioned whether the issue of equivalence in draft article 13 was the same as that of trustworthiness as addressed in draft article 10.

117. It was proposed that if paragraph (2) was to be included in the text of the Uniform Rules, a number of drafting changes would be required. It was proposed that subparagraphs (g) and (h) were more relevant to draft article 13 and should be deleted from draft article 10. It was also proposed that the reference to "within the jurisdiction" in subparagraph (a) was problematic and that what was important was only that the supplier of certification services should have resources to which recourse could be had, not that they must be in the jurisdiction of the enacting State. It was observed that paragraph (2)(b) was circular in meaning and that a term such as "quality" or "reliability" should be substituted for "trustworthiness". It was generally agreed that, should the list of factors contained in paragraph (2) be finally retained in the Uniform Rules, those drafting suggestions would need to be taken into account. Under the same proviso, it was agreed that the list of factors would need to be made open-ended, through the inclusion of either the words "inter alia" or an additional subparagraph, which might read "and any other relevant factor". While the relevance of the financial situation of the certification services supplier to trustworthiness was questioned, it was suggested that those factors did help to show that the supplier was reliable and trustworthy and fostered the confidence of users.

118. To address a number of the concerns about including paragraph (2) in draft article 10, it was proposed that a separate article could be formulated which would be relevant to determining trustworthiness under draft article 10 as well as under draft article 13.

119. After discussion, the Working Group decided to retain the contents of paragraph (2) between square brackets and to place the paragraph provisionally in a separate article, pending a final decision to be made after discussion of draft article 13.

Paragraph (4)

120. Wide support was expressed in favour of the basic rule of liability set forth in paragraph (4) of variants X and Y, which left it up to national law to determine the consequences of liability. The view was expressed that paragraph (4) was a sufficient statement of the principle of liability, consistent with what the Working Group had decided in respect of draft article 9

concerning the signatory, and that it was not practicable to consider a second paragraph addressing the consequences of that liability.

121. Concern was expressed that paragraph (4) might be interpreted as a rule of absolute liability and that more might be needed to ensure that the supplier of certification services could prove, for example, the absence of fault or contributory fault. What was required was a provision which ensured that there was no strict liability and no penalties, but compensation for loss. Wording along the following lines was proposed:

> "A supplier of certification services may be liable for loss caused by its failure to satisfy the requirements of paragraph (1)."

122. That proposal did not receive support. It was observed that if liability was to be addressed by a simple statement of principle, that statement should indicate that the supplier of certification services should be liable for certain failures; a discretionary provision was not sufficient. It was suggested that the guide to enactment could confirm that the intention of paragraph (4) was not to establish a rule of strict liability.

Paragraph (5)

123. In support of including a paragraph addressing the consequences of liability as set forth in the three variants of paragraph (5), it was observed that suppliers of certification services performed intermediary functions that were fundamental to electronic commerce and that the question of the liability of such professionals would not be sufficiently addressed by adopting a single provision along the lines of paragraph (4). Although the same provision had been adopted by the Working Group in draft article 9, a distinction was drawn between the classes of persons covered by draft articles 9 and 10. The view was expressed that while paragraph (4) might state an appropriate principle for application to signatories, it was not sufficient for addressing the professional and commercial activities covered by draft article 10. In addition, it was noted that, at the current stage of development of the certification industry, there was insufficient legal analysis of the issues relating to liability of certification service providers and inclusion of a more detailed provision in the draft rules would therefore be very useful. In that connection, it was suggested that further attention might need to be given to establishing a limitation period for exercising legal action based on the liability of the certification services provider.

Variant X

124. Paragraph (5) of variant X received limited support. The view was expressed that the test of foreseeability of damage was widely accepted in international law as an appropriate standard and for that reason could be included in draft article 10. A contrary view was that paragraph (5) of variant X established a standard that was higher than would usually be the case in contract law.

Variant Y

125. Wide support was expressed in favour of including paragraph (5) of variant Y in draft article 10. It was noted that while variants X and Z reflected general rules that were already established, variant Y focused specifically upon electronic commerce and provided a very useful list of factors likely to be of most relevance to that context.

126. As an alternative to including the list of factors in the text, and in order to avoid the difficulties raised with respect to liability in the context of draft article 9, it was proposed that the substance of paragraph (5) of variant Y could be included in the guide to enactment to the Uniform Rules. The view was expressed that the factors should not operate to limit the normal criterion for liability that would exist in many States. It was therefore proposed that

paragraph (5) should be stated as indicative criteria or a non-exhaustive list, rather than as a means of interpreting paragraph (4).

Variant Z

127. Limited support was expressed in favour of variant Z. It was observed that variant Z addressed the means by which the supplier of certification services could limit or avoid liability by stating a limit in the certificate or showing that it had not acted negligently. That formulation gave guidance as to how liability should be set, as opposed to the simple statement in paragraph (4), which was little more than a statement of principle and provided no guidance. It was also noted that if the article were limited to paragraph (4), it might be very difficult to prove that the supplier of certification services had not satisfied the requirements in paragraph (1) of draft article 10. In contrast, a provision along the lines of variant Z would enable the burden of proof to be shifted to the supplier of certification services, which in most cases would have the information pertinent to the issue of liability, and should assist the persons named in paragraph (4) of variant Z to prove their case. It was suggested that that type of provision was a good way of striking a balance between what parties must and could prove.

128. A contrary view was that variant Z was too specific as to the parties covered in paragraph (4), that it might not cover situations where the supplier should be liable notwithstanding that it could satisfy the requirements of paragraph (5) and that paragraph (5)(a) might create difficulties in States where limitations of liability were not accepted.

129. After discussion, the Working Group adopted paragraph (4) as set forth in variants X and Y, with the substance of paragraph (5) of variant Y to be included in the guide to enactment as a list of indicative criteria.

Article 11. Reliance on electronic signatures

and

Article 12. Reliance on certificates

130. It was generally agreed, at the outset of the discussion of draft articles 11 and 12, that the two articles should be considered jointly, in view of the need to merge the two sets of provisions and to address the situation of the relying party in the context of both reliance on a signature and reliance on a certificate.

131. The text of draft article 11 as considered by the Working Group was as follows:

"(1) A person is not entitled to rely on an electronic signature to the extent that it is not reasonable to do so.

"(2) [In determining whether reliance is not reasonable,] [In determining whether it was reasonable for a person to have relied on the electronic signature,] regard shall be had, if appropriate, to:

(a) the nature of the underlying transaction that the electronic signature was intended to support;

(b) whether the relying party has taken appropriate steps to determine the reliability of the electronic signature;

(c) whether the relying party took steps to ascertain whether the electronic signature was supported by a certificate;

(d) whether the relying party knew or ought to have known that the electronic signature device had been compromised or revoked;

(e) any agreement or course of dealing which the relying party has with the subscriber, or any trade usage which may be applicable;

(f) any other relevant factor."

132. The text of draft article 12 as considered by the Working Group was as follows:

"(1) A person is not entitled to rely on the information in a certificate to the extent that it is not reasonable to do so.

"(2) In determining whether reliance is not reasonable,] [In determining whether it was reasonable for a person to have relied on the information in a certificate,] regard shall be had, if appropriate, to:

(a) any restrictions placed upon the certificate;

(b) whether the relying party has taken appropriate steps to determine the reliability of the certificate, including reference to a certificate revocation or suspension list where relevant;

(c) any agreement or course of dealing which the relying party has or had at the relevant time with the supplier of certification services or subscriber or any trade usage which may be applicable;

(d) any other relevant factors.

"Variant A

"(3) If reliance on the electronic signature is not reasonable in the circumstances having regard to the factors in paragraph (1), a relying party assumes the risk that the signature is not a valid signature.

"Variant B

"(3) If reliance on the signature is not reasonable in the circumstances having regard to the factors in paragraph (1), a relying party shall have no claim against the signature device holder or the supplier of certification services."

Paragraph (1)

133. As to whether a general provision along the lines of paragraph (1) of draft articles 11 and 12 was needed, various views were expressed. One view was that such a provision was unnecessary, since most legal systems would readily come to the conclusion reached in paragraph (1). Another view was that paragraph (1) should be in the form of a positive rule along the following lines: "A person is entitled to rely on an electronic signature or a certificate if and to the extent that it is reasonable to do so." While support was expressed for adopting a positive formulation, an objection was raised on the grounds that the provision might be misread as creating a right for the relying party in the context of any electronically signed document. In that connection, doubts were expressed as to the legal significance of an "entitlement to rely" on a signature or certificate.

134. A proposal was made to rephrase paragraph (1) as follows: "Reliance on an electronic signature or certificate falling within the scope of these Rules shall be protected if, and to the extent that, such reliance is reasonable in the light of all the circumstances." While support

was expressed in favour of that proposal, it was generally felt that the notion of reliance on electronic signatures and certificates being "protected" by law might raise difficult questions of interpretation. After discussion, the Working Group agreed that the Uniform Rules would provide sufficient guidance as to the standard of conduct to be observed by the relying party if a provision along the lines of paragraph (2) was retained. It was decided that paragraph (1) should be deleted.

Paragraph (2)

135. Various proposals were made for redrafting paragraph (2). One proposal was that the new provision should read along the following lines:

"The relying party [assumes the risk] [bears the consequences] of not:

(a) taking adequate steps to verify the reliability of an electronic signature;

(b) verifying the existence or revocation of a certificate; and

(c) complying with any restriction contained in the certificate."

136. Wide support was expressed for the substance of the proposal. In response to an objection that such a rule might place a burden on relying parties, particularly where such parties were consumers, it was observed that the Uniform Rules were not intended to overrule any rule governing the protection of consumers. It was pointed out in that connection that the Uniform Rules might play a useful role in educating all parties involved, including relying parties, as to the standard of reasonable conduct to be met with respect to electronic signatures. In addition, it was recalled that establishing a standard of conduct under which the relying party should verify the reliability of the signature through readily accessible means was essential to the development of any public-key infrastructure (PKI) system.

137. A question was raised as to the scope of the notion of "relying party". It was generally agreed that, consistent with industry practice, the notion of "relying party" was intended to cover any party that might rely on an electronic signature. Depending on the circumstances, a "relying party" might thus be any person having or not a contractual relationship with the signatory or the certification services provider. It was even conceivable that the certification services provider or the signatory might themselves become "relying parties". Based on that broad definition of "relying party", concern was expressed that draft article 11 should not result in the subscriber of a certificate being placed under an obligation to verify the validity of the certificate it was purchasing from the certification services provider. It was suggested that further clarification as to this point might need to be inserted in the guide to enactment.

138. Another concern was raised as to the possible impact of establishing as a general obligation that the relying party should verify the validity of the electronic signature or certificate. It was stated that, should it fail to comply with that obligation, the relying party should not be precluded from availing itself of the signature or certificate if reasonable verification would not have revealed that the signature or certificate was invalid. It was generally felt that such a situation should be dealt with by the law applicable outside the Uniform Rules, and mentioned, as appropriate, in the guide to enactment.

139. With a view to improving on the drafting of the proposal contained in paragraph 135 above, the following was proposed as a possible substitute for paragraph (2):

"(1) Where an electronic signature is supported by a certificate, a person intending to rely on that electronic signature bears the risk that it may not be reliable for the purposes of article 6(1) if he has not ascertained from information available to him that the certificate is valid for the purpose of supporting that electronic signature.

"(2) The information referred to in paragraph (1) includes information:

(a) which the certification services provider has made available in accordance with article 10(1)(c); and

(b) any other information known to the person intending to rely, which establishes, or gives rise to a substantial risk, that the certificate is not valid for the purpose of supporting that electronic signature."

140. No support was expressed in favour of the above proposal, which was said to establish an unnecessary and potentially misleading connection between draft article 11 and draft article 6. It was generally felt that the issue of the validity of an electronic signature under draft article 6 should not depend upon the conduct of the relying party. That issue should be kept separate from the issue of whether it was reasonable for a relying party to rely on a signature that did not meet the standard set forth in article 6.

141. Another suggestion building upon the text proposed in paragraph 135 above, and taking into account some of the above-mentioned concerns, was as follows:

"(1) A person is entitled to rely on an electronic signature or a certificate if and to the extent that such reliance is reasonable in the light of all the circumstances.

"(2) A relying party should bear the risk that an electronic signature is not valid if the relying party fails to take reasonable steps to verify the reliability of the electronic signature.

"(3) Where an electronic signature is supported by a certificate, a relying party shall bear the risk that the certificate is not valid if the relying party fails:

(a) to take reasonable steps to verify the existence, suspension or revocation of the certificate; or

(b) to comply with or to observe any restrictions or limitations contained in the certificate.

"(4) If a relying party fails to take the steps set out in paragraphs (2) and (3), such failure may be taken into account in determining:

(a) whether the relying party is entitled to seek recovery from any person; or

(b) the extent to which the amount otherwise recoverable by the relying party should be reduced as a consequence of the relying party's conduct."

142. While some support was expressed for the substance of the proposal, it was generally felt that it would not be appropriate for the Uniform Rules to attempt to deal in any detail with the law of civil or commercial liability, as suggested in paragraph (4) of the new proposal.

143. After discussion, the Working Group decided that draft article 11 should read along the following lines:

"A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps in the light of the circumstances to verify the reliability of an electronic signature; or

(b) where an electronic signature is supported by a certificate, take reasonable steps in the light of the circumstances to:

(i) verify the validity, suspension or revocation of the certificate; and

(ii) observe any limitation with respect to the certificate."

Notes

[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223-224.

[2] Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

[3] Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), paras. 207-211.

[4] Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-314.

ANNEX

Draft articles 1 and 3 to 11 of the UNCITRAL Uniform Rules on Electronic Signatures

(as adopted by the UNCITRAL Working Group on Electronic Commerce at its thirty-sixth session, held in New York from 14 to 25 February 2000)

Article 1. Sphere of application

These Rules apply where electronic signatures are used in the context* of commercial** activities. They do not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of these Rules:

"These Rules apply where electronic signatures are used, except in the following situations: [...]."

**The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

...

Article 3. Equal treatment of signature technologies

None of these Rules, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) of these Rules or otherwise meets the requirements of applicable law.

Article 4. Interpretation

(1) In the interpretation of these Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Article 5. Variation by agreement

These Rules may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under the law of the enacting State [or unless otherwise provided for in these Rules].

Article 6. Compliance with a requirement for a signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the means of creating the electronic signature is, within the context in which it is used, linked to the signatory and to no other person;

(b) the means of creating the electronic signature was, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

(5) The provisions of this article do not apply to the following: [...]

Article 7. Satisfaction of article 6

(1) *[Any person, organ or authority, whether public or private, specified by the enacting State as competent]* may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Article 8. Conduct of the signatory

(1) Each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature device;

(b) without undue delay, notify any person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

(i) the signatory knows that the signature device has been compromised; or

(ii) the circumstances known to the signatory give rise to a substantial risk that the signature device may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 9. Conduct of the supplier of certification services

(1) A supplier of certification services shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

(i) the identity of the supplier of certification services;

(ii) that the person who is identified in the certificate had control of the signature device at the time of signing;

(iii) that the signature device was operational on or before the date when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

(i) the method used to identify the signatory;

(ii) any limitation on the purpose or value for which the signature device or the certificate may be used;

(iii) that the signature device is operational and has not been compromised;

(iv) any limitation on the scope or extent of liability stipulated by the supplier of certification services;

(v) whether means exist for the signatory to give notice that a signature device has been compromised;

(vi) whether a timely revocation service is offered;

(e) provide a means for a signatory to give notice that a signature device has been compromised, and ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).

[Article 10. Trustworthiness

In determining whether and the extent to which any systems, procedures and human resources utilized by a supplier of certification services are trustworthy, regard shall be had to the following factors:

(a) financial and human resources, including existence of assets;

(b) quality of hardware and software systems;

(c) procedures for processing of certificates and applications for certificates and retention of records;

(d) availability of information to signatories identified in certificates and to potential relying parties;

(e) regularity and extent of audit by an independent body;

(f) the existence of a declaration by the State, an accreditation body or the supplier of certification services regarding compliance with or existence of the foregoing; and

(g) any other relevant factor.]

Article 11. Conduct of the relying party

A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps to verify the reliability of an electronic signature; or

(b) where an electronic signature is supported by a certificate, take reasonable steps to:

(i) verify the validity, suspension or revocation of the certificate; and

(ii) observe any limitation with respect to the certificate.

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I. Introduction

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General of the United Nations made the opening speech. In addition to speeches by former participants in the diplomatic conference that adopted the Convention, leading arbitration experts gave reports on matters such as the promotion of the Convention, its enactment and application. Reports were also given on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on practical difficulties that were encountered in practice but were not addressed in existing legislative or non-legislative texts on arbitration.[1]

2. In reports presented at that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible.

3. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[2]

4. At its thirty-second session, the Commission had before it the requested note entitled "Possible future work in the area of international commercial arbitration" (document A/CN.9/460). The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, the Congress of the International Council for Commercial Arbitration (Paris, 3-6 May 1998),[3] and other international conferences and forums, such as the 1998 "Freshfields" lecture.[4] The note discussed some of the issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wished to put any of those issues on its work programme.

5. The Commission welcomed the note by the Secretariat and the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. It was generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.

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[1] *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

[2] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[3] *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999.

[4] Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, page 211.

6. Possible work topics considered by the Commission were the following:

a) Conciliation (A/CN9/460, paras. 8-19; A/54/17, paras. 340-343);
b) Requirement of written form (A/CN.9/460, paras. 20-31; A/54/17, paras. 344-350);
c) Arbitrability (A/CN.9/460, paras. 32-34; A/54/17, paras. 351-353);
d) Sovereign immunity (A/CN.9/460, paras. 35-50; A/54/17, paras. 354-355);
e) Consolidation of cases before arbitral tribunals (A/CN.9/460, paras. 51-60; A/54/17, paras. 356-357);
f) Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71; A/54/17, paras. 358-359);
g) Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79; A/54/17, paras. 360-361);
h) Decisions by "truncated" arbitral tribunals (A/CN.9/460, paras. 80-91; A/54/17, paras. 362-363);
i) Liability of arbitrators (A/CN.9/460, paras. 92-100; A/54/17, paras. 364-366);
j) Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106; A/54/17, paras. 367-369);
k) Costs of arbitral proceedings (A/CN.9/460, paras. 107-114; A/54/17, para. 370);
l) Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127; A/54/17, paras. 371-373);
m) Possible enforceability of an award that has been set aside in the State of origin (A/CN.9/460, paras. 128-144; A/54/17, paras. 374-376).

7. At various stages of the discussion, several other topics, in addition to those contained in document A/CN.9/460, were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time (A/54/17, para. 339).

8. In its considerations the Commission kept an open mind as to the ultimate form that future work of the Commission might take. It was agreed that decisions as to the form should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). It was thought that, even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation, would be a useful contribution to the practice of international commercial arbitration. The considerations of the Commission on those issues are reflected in document A/54/17 (paras. 337-376 and para. 380).

9. After concluding the discussion on its future work in the area of international commercial arbitration, it was agreed that the priority items for the working group should be conciliation (A/54/17, paras. 340-343), requirement of written form for the arbitration agreement (A/54/17, paras. 344-350), enforceability of interim measures of protection (A/54/17, paras. 371-373) and possible enforceability of an award that had been set aside in the State of origin (A/54/17, paras. 374-375). It was expected that the Secretariat would prepare the necessary documentation for the first session of the Working Group for at least two, and possibly three, of those four topics. As to the other topics discussed in document A/CN.9/460, as well as topics for possible future work suggested at the thirty-second session of the Commission (A/54/17, para. 339), which were accorded lower priority, the Working Group was to decide on the time and manner of dealing with them.

10. The Commission entrusted the work to a working group to be named "Working Group on Arbitration" and requested the Secretariat to prepare the necessary documentation for the meeting.

11. The Working Group on Arbitration, which was composed of all the States members of the Commission, held its thirty-second session at Vienna from 20 to 31 March 2000. The session was attended by representatives of the following States members of the Working Group: Austria, Cameroon, China, Colombia, Egypt, Finland, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

12. The session was attended by observers from the following States: Argentina, Canada, Costa Rica, Cuba, Czech Republic, Denmark, Indonesia, Lebanon, Morocco, Netherlands, Peru, Poland, Portugal, Republic of Korea, Rwanda, Saudi Arabia, Slovakia, Sweden, Switzerland, Turkey, Ukraine and Venezuela.

13. The session was attended by observers from the following international organizations: Economic Commission for Europe, NAFTA Article 2022 Advisory Committee; Permanent Court of Arbitration; Cairo Regional Centre for International Commercial Arbitration, Chartered Institute of Arbitrators; International Chamber of Commerce (ICC); International Federation of Commercial Arbitration Institutions.

14. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Mr V. G. HEGDE (India).

15. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.107) and the report of the Secretary-General entitled "Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement" (A/CN.9/WG.II/WP.108 and Add.1).

16. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Possible preparation of harmonized texts on conciliation; interim measures of protection; and written form of arbitration agreements.
4. Other business.
5. Adoption of the report.

II. Deliberations and Decisions

17. The Working Group discussed agenda item 3 on the basis of the report of the Secretary-General (A/CN.9/WG.II/WP.108 and Add.1). The deliberations and conclusions of the Working Group with respect to that item are reflected below.

A. Conciliation

1. General considerations

18. The Working Group took note of statements to the effect that conciliation or mediation was being increasingly used for settling commercial disputes, that the use of such non-contentious methods of dealing with disputes deserved to be promoted and that the work of the Commission in the area should be geared to such promotion. It was noted that conciliation was being used either independently from court or arbitral proceedings or as part of, or in close relationship to, such proceedings and that solutions to be adopted should take that fact into account.

19. It was generally agreed that the term "conciliation" should be understood as a broad notion encompassing various types of proceedings in which a person or a panel of persons was invited by the parties in dispute to assist them in an independent and impartial manner to reach an amicable settlement of the dispute. It was also generally agreed that such proceedings may differ as regards the procedural techniques used to facilitate settlement and that different expressions might be used to refer to such proceedings, such as, for example, "mediation" or other expressions used for non-binding methods of dispute settlement.

20. It was generally considered that decisions as to the form of the text to be prepared should be made at a later stage when the substance of prepared solutions would become clearer. However, it was noted that model legislative provisions seemed to be the appropriate form for a number of matters proposed to be discussed in the area of conciliation.

21. There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters. It was suggested that a flexible provision such as the one contained in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration was an appropriate way for defining which matters were to be considered commercial.

2. Admissibility of certain evidence in subsequent judicial or arbitral proceedings (A/CN.9/WG.II/WP.108, paras. 18 -28)

22. General statements were made that confidentiality of information put forward by the parties during conciliation should be safeguarded. It was noted that confidentiality of information relating to conciliation may become an issue in different contexts: (a) in the circumstances dealt with in article 20 of the UNCITRAL Conciliation Rules; (b) as a general obligation on the conciliator and the parties to keep confidential all matters relating to the conciliation proceedings (such an obligation was contained in article 14 of the UNCITRAL Conciliation Rules); and (c) in the cases where a party gave information to the conciliator subject to a specific condition that it be kept confidential and the conciliator (in line with article 10 of the UNCITRAL Conciliation Rules) was not to disclose that information to the other party. The discussion in the Working Group centered on cases under (a), which were covered by article 20 of the UNCITRAL Conciliation Rules. There was no discussion or decision made to prepare a uniform rule on a general obligation to keep matters relating to the conciliation proceedings confidential (article 14 of the UNCITRAL Conciliation Rules). (As to information given by a party to the conciliator subject to a specific condition that it be kept confidential, see below, paras. 54-55).

23. There was wide agreement in the Working Group that article 20 of the UNCITRAL Conciliation Rules provided a good basis for drafting a model legislative provision on the admissibility of certain oral and written evidence in arbitral or judicial proceedings. There was no doubt in the Working Group about the proposition that the provision to be prepared was to be subject to party autonomy.

24. With a view to avoiding too much detail in the model legislative provision, a suggestion was made not to list the types of facts that were to be covered by the provision, but instead to employ a more general wording relying on the applicable national law governing admissibility of evidence. However, caution was expressed that such an approach might not provide sufficient certainty in particular because the applicable law of evidence might itself not be sufficiently clear or because the parties might not be familiar with it.

25. It was considered that the model provision to be prepared should deal with situations where the parties had agreed to a rule such as the one contained in article 20 of the UNCITRAL Conciliation Rules (and thereby give legislative backing to such an agreement) as well as with situations where the parties engaged in a conciliation without having agreed to such a rule. In both cases, it was said, the uniform rule should aim at preventing the "spillover" of certain facts (in particular those mentioned in article 20 of the UNCITRAL Conciliation Rules) into subsequent judicial or arbitral proceedings. As to cases where the parties have not agreed on a rule such as article 20 of the UNCITRAL Conciliation Rules, it was suggested that the model provision should state that it was an implied term of an agreement to conciliate that the parties undertook not to rely in any subsequent arbitral or judicial proceedings on evidence of the types of facts to be specified in the model provision. In order to ensure that such an implied agreement would be given effect by courts and arbitral tribunals, it was suggested that it should also be provided that evidence of facts to be specified in the model provision were not to be admitted in evidence and that disclosure of those facts was not to be ordered by the arbitral tribunal or the court. In that connection, it was also suggested that the model provision should cover cases where views, admissions or proposals made during conciliation proceedings were sought to be raised in subsequent court or arbitral proceedings not by a party who had participated in the conciliation but by a third party such as a sub-contractor of a party.

26. It was suggested it should be made clear that the model provision would apply to facts to be specified in it whether or not they were recorded in a document.

27. For the cases where evidence was offered in contravention of the statutory provision to be prepared, it was considered that the court or the arbitral tribunal should deal with the issue by ordering that such evidence was inadmissible and was to be disregarded. While other sanctions might apply when a party breached the statutory provision on the exclusion of certain evidence, as provided in the applicable law, the model provision did not necessarily have to deal with those sanctions.

28. It was pointed out that any solution should be flexible enough to deal adequately with different circumstances in which parties might participate in conciliation proceedings, including those where the parties attempted to reach settlement in a conciliation during court or arbitral proceedings.

29. It was observed that a party might attempt to present, during court or arbitral proceedings, inadmissible evidence of proposals or views which that party itself had made during earlier conciliation proceedings and mention in that connection also proposals or views that had been made during the conciliation by the other party. It was considered that the model provisions to be prepared should be broad enough to cover such situations.

30. The Working Group requested the Secretariat to prepare for its next session draft legislative provisions based on the considerations in the Working Group.

3. Role of conciliator in arbitration or court proceedings (A/CN.9/WG.II/WP.108 paras. 29-33)

31. On the question of whether a person who had acted as a conciliator could subsequently be appointed as an arbitrator, represent a party in an arbitration or be called as a witness, it was generally agreed that article 19 of the UNCITRAL Conciliation Rules provided a useful starting point for consideration of a possible legislative provision. It was observed that in some States a clear distinction was drawn between the conduct of conciliation and arbitration and there was a concern that, if the conciliator could subsequently act as arbitrator, the parties would be less likely to approach the conciliation openly and share information, potentially jeopardizing its success. In other States the conduct of conciliation and arbitration were not so clearly distinguished.

32. As a preliminary point, it was suggested that the roles referred to in article 19 (arbitrator, representative or counsel, witness) should be treated separately, since each raised different considerations. It was also suggested that, while some of those issues could appropriately be addressed in a statutory provision, others might best be addressed by, for example, codes of conduct or ethics. The view was expressed that in the context of the conciliator acting as representative of a party, the general position should be a prohibition, subject to contrary agreement by the parties. That approach would encourage frank exchanges between the parties and protect the confidentiality and integrity of conciliation and arbitration processes. Ethical considerations might also be relevant in that context.

33. In the context of the conciliator appearing as a witness, it was suggested that the general position should also be a prohibition against parties or others compelling such testimony, although there might be a need for exceptions. Circumstances in which that might be necessary could include, for example, proceedings to enforce the settlement agreement where it was alleged that the agreement was fraudulently obtained. In that regard, however, it was pointed out that fraud might be either civil or criminal in nature and raise questions of national law. Any exceptions to the general rule would need to be carefully considered. It was also noted, in the context of witnesses, that considerations relating to witnesses appearing in arbitral proceedings might be different to those applicable to judicial proceedings. In addition, concern was expressed as to the extent to which, firstly, parties could agree to exclude a witness from subsequent proceedings, whether arbitral or judicial, and secondly, an undertaking on the part of the conciliator not to appear would always be effective in all circumstances.

34. As to the question of a conciliator acting as an arbitrator, it was suggested that that should also be prohibited unless otherwise agreed by the parties. It was noted, however, that in some cases there might be ethical considerations which would suggest that the conciliator should decline to act.

35. General support was expressed in favour of a rule which provided that, unless otherwise agreed by the parties, the conciliator could not perform those roles. It was observed that the benefit of establishing a statutory provision to that effect would be to ensure that the agreement between the parties was given full effect and observed by all relevant parties and institutions, including the appointing authority and a court. Some support was also expressed in favour of a rule providing that the parties would be deemed to have agreed that the conciliator should not act.

36. A further question was raised concerning extension of the restrictions on the conciliator beyond the actual case considered in the conciliation to cases on related contracts or other disputes arising from the same contract as discussed in paragraph 33 of document A/CN.9/WG.II/WP.108. It was suggested that that issue was very complex and raised difficult drafting issues of how the relationship between the different contracts and disputes could be defined. It was pointed out that an examination of the facts of each case would be necessary to

determine, for example, the extent to which a dispute raised issues relating to the main contract and the extent to which the conciliator was required to consider issues central to that contract. Another view was that disclosure requirements or codes of ethics were more appropriate to address the issues raised by such considerations. Although some support was expressed for omitting the issue from statutory rules, the general view was that the Secretariat should be requested to consider it further to see if an appropriate general formulation could be found.

37. After discussion, the Working Group agreed that a provision based upon article 19 should be drafted taking into account the discussions of the Working Group.

4. Enforceability of settlement agreements reached in conciliation proceedings (A/CN.9/WG.II/WP.108, paras. 34 to 42)

38. The Working Group discussed the question whether a settlement reached during a conciliation should be treated as an enforceable title as, or similarly to, arbitral awards. Views were divided on the question. According to one view, it was desirable to increase the attractiveness of conciliation, and therefore settlements reached during conciliation should be given the effect of an enforceable title. A number of States had adopted legislation to that effect and it was considered desirable to take into account their good experience and prepare a harmonized model provision for other States that might wish to enact it.

39. According to another view, it was not feasible, notwithstanding the desirability of promoting the use of conciliation, to prepare a workable uniform rule and that therefore the matter should be left to non-harmonized legislation of States. It was said that it would be difficult to distinguish in a legislative provision between settlements that should be treated as enforceable titles and those that should not enjoy such a special treatment. It was also considered inappropriate to equate settlements reached in conciliation with arbitral awards because of the fundamental differences between arbitration and conciliation. Moreover, in the view of some there was no need to treat settlements reached during a conciliation as enforceable titles because in many States there were simple ways in which a settlement between parties could be made enforceable (e.g. by converting the settlement into a notarized document or by obtaining a judicial sanction for the settlement). Furthermore, if the parties wanted to make their settlement an enforceable title, it was often not overly cumbersome for them to initiate arbitral proceedings with the sole purpose of converting the settlement into an arbitral award on agreed terms. In response to those arguments it was said that those possibilities did not exist in some countries or were connected with difficulties which parties in international trade might wish to avoid. Furthermore, sometimes the parties did not take advantage of those possibilities at the time the settlement was entered into, and the need to enforce the settlement became apparent only later when a party refused to live up to its part of the settlement. In addition, it was observed that legislation treating settlements reached during conciliation as enforceable titles existed and functioned satisfactorily in a number of States.

40. After discussion, the view prevailed that it would be premature to decide not to prepare the suggested uniform rule and therefore the Secretariat was requested to prepare draft provisions, possibly with variants, to be considered by the Working Group at its next session. Those provisions should address enforcement, irrespective of the country in which the settlement was made. Several suggestions were made regarding the preparation of the drafts. One was that the settlement agreement should be made in writing or a form equivalent to writing and that it should be signed or authenticated by the parties and the conciliator. Another suggestion was that such settlement agreements should be made subject to the legislative provisions governing the recognition and enforcement of arbitral awards. A further suggestion was, instead of subjecting settlements reached in conciliation to provisions on arbitral awards, to prepare a special provision on settlements reached in conciliation; in drafting such a provision, articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration provided a good model. In discussing that suggestion a proposal was

made to adapt article 36 of the Model Law to the characteristics of settlements reached in a conciliation; the proposal was to reduce the grounds on which the recognition or enforcement of a settlement may be refused to an incapacity of a party and a violation of public policy. Non-arbitrability of a dispute was mentioned as a further possible ground for refusal to recognize or enforce a settlement. The procedure under which a settlement agreement would be enforced was considered by some to be a matter to be left to the law of the State in question.

5. Other possible items for harmonized treatment

a) Admissibility or desirability of conciliation by arbitrators (A/CN.9/WG.II/WP.108 paras. 44-48)

41. The Working Group noted that there was a wide diversity of views as to the desirability of an arbitrator acting as a conciliator in arbitration proceedings and the attendant difficulty of achieving a common solution. One view was that a distinction should be drawn between an arbitrator recommending the use of a conciliator to reach a settlement and the arbitrator actually performing that function him or herself. While recommending the use of a conciliator should be encouraged, since the arbitrator would be in a unique position to decide whether such a step was appropriate and likely to be successful, the arbitrator acting as a conciliator was not desirable on the basis that different skills and qualities were required to perform the two functions. It was also suggested that such a practice might lead to procedural difficulties, including where an arbitrator acting as conciliator was involved in recommending the terms and conditions of a settlement which was then rejected, leaving that person to arbitrate the dispute. It was noted in response to those objections that in those jurisdictions and institutions where the practice was permitted, there was little evidence of disruption to the dispute resolution process in the cases where it had occurred.

42. An alternative view was that the arbitrator should be permitted to act as a conciliator and, under the national law of a number of countries, an arbitrator in fact had a duty to try to conciliate a dispute referred to arbitration. It was suggested that because the arbitrator was in a unique position to know the facts and circumstances of the case, it was the most cost effective option for the arbitrator to act as the conciliator, rather than referring the parties to a conciliator external to the arbitration proceedings, who would not have the same familiarity with the case and would have to start from the beginning.

43. A further distinction was noted between the situation where an arbitrator took the initiative to conciliate and where the parties requested the arbitrator to conciliate. The view was expressed that emphasis should be placed upon party autonomy and only where the parties agreed should the arbitrator be permitted to act as conciliator.

44. As to the desirability of formulating a legislative provision on the issue, one view that it should not be the purpose of the work of the Commission to unify arbitration and conciliation practices and that therefore no uniform rule should be prepared. Another view, however, was that it would be worthwhile to prepare a uniform rule whose purpose would be to recognize party autonomy and to clarify that it was not incompatible with the role of the arbitral tribunal to raise the question of a possible conciliation and, to the extent agreed by the parties, to participate in the efforts to reach an agreed settlement. It was agreed that the Secretariat should prepare a draft provision along those lines, possibly with alternatives.

b) Effect of an agreement to conciliate on judicial or arbitral proceedings (A/CN.9/WG.II/WP.108 paras 49-52)

45. The Working Group considered the question whether, when the parties agreed to resolve a dispute by conciliation (as opposed to arbitration or court proceedings), it was

advisable for the law to regard that agreement as binding in the sense that a party was not free to initiate arbitration or court proceedings until it complied with its commitment to conciliate.

46. Some support was expressed for the position that, in view of the fact that conciliation was seen as a preferred method of settling disputes, the law should treat conciliation agreements as binding; therefore, a uniform provision to that effect should be prepared.

47. However, the prevailing view was that conciliation should be regarded as a voluntary process in that the parties should be obliged to conciliate only if, and as long as, they believed that there was hope that a settlement could be achieved. Any notion that there should be a "paralysis" of arbitral or court proceedings until the parties went through the process of conciliation was bound to result in more difficulty than benefit and that therefore no uniform rule treating conciliation agreements as binding should be prepared. Pursuant to those views, one suggested conclusion was that no uniform provision was necessary, since conciliation rules (such as art. 15 of the UNCITRAL Conciliation Rules) generally allowed a party to terminate conciliation proceedings. Another suggested conclusion was that it might be useful to have a uniform legislative provision that would clarify that a party was free to terminate conciliation proceedings. A view was expressed that a uniform provision should clarify that if during conciliation proceedings a party commenced arbitral or court proceedings that act should be deemed as terminating conciliation proceedings.

48. Some support was expressed for a provision which would recognize the effectiveness of an express agreement of the parties limiting their own freedom to commence arbitral or court proceedings until they complied with their obligation to conciliate.

49. After discussion, the Secretariat was requested to prepare alternative versions of a uniform provision reflecting the views of the Working Group.

c) Effect of conciliation on the running of the limitation period
(A/CN.9/WG.II/WP.108, paras. 53-55)

50. The Working Group discussed the question of whether it would be desirable to prepare a uniform rule providing that the initiation of conciliation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the conciliation.

51. Some support was expressed for the preparation of such a uniform provision. It was said that the situation created by such a provision was preferable to a situation where a party was compelled to initiate arbitral or court proceedings only for the purpose of preserving its rights. Formulating such a provision was desirable as a measure to foster the use of conciliation and protect the legitimate interests of parties engaging in it.

52. However, while expressing sympathy for the objectives of the proposed provision, doubts were voiced as to its feasibility. The grounds included the following: it would be difficult to define the moment when conciliation proceedings commenced, which was the moment triggering the interruption of a limitation or prescription period; it would be difficult to define the moment conciliation proceedings ended, which was the moment the limitation or prescription period continued to run; the proposed uniform provision would touch upon national rules of procedure (some of which were of a mandatory nature), an area where the readiness of States to accept unified concepts was not as great as in the area of substantive rules; and it would be necessary to resolve the relationship between the proposed uniform provision and international treaties governing limitation periods.

53. After discussion, and recognizing the difficulties involved in formulating a widely acceptable provision on the issue under discussion, the Working Group considered that it would be worthwhile to study the matter further. It was suggested that the rule would be more

acceptable if the prescription or limitation period was suspended as a result of conciliation proceedings and would continue to run after the conciliation proceedings had ended. The Secretariat was requested to prepare a draft, possibly with alternatives, to be considered by the Working Group at its next session.

d) Communication between the conciliator and parties; disclosure of information (A/CN.9/WG.II/WP.108, paras. 56-60)

54. The Working Group discussed the question of whether it would be desirable to prepare a uniform provision clarifying that it was consistent with the principles of equality between the parties (a) if the conciliator met either with the parties together or with each of the parties separately, and (b) if the conciliator did not disclose to all parties the information that he or she received from one party subject to a specific condition that it be kept confidential. It was noted that such a manner of proceeding was expressly dealt with in articles 9 and 10 of the UNCITRAL Conciliation Rules. A view was expressed that the provisions of a model law should be more flexible than article 10 in order not to restrict conciliators from using a variety of techniques that were useful in practice.

55. There was agreement in the Working Group that a provision along those lines would be useful because it would provide welcome clarification of the flexible nature of the conciliation process and remove any doubts as to the propriety of procedures such as those covered by articles 9 and 10 of the UNCITRAL Conciliation Rules. The Secretariat was requested to prepare draft provisions for the next session of the Working Group using as starting points the referred to articles 9 and 10 of the Rules.

e) Role of conciliator (A/CN.9/WG.II/WP.108, paras. 61 and 62)

56. There was general agreement in the Working Group that it would be useful to prepare a uniform provision setting out the guiding principles of conciliation proceedings. Such a general provision would contribute to harmonizing standards of conciliation and would also be helpful in defining conciliation proceedings to which other uniform provisions on conciliation to be prepared by the Commission would apply. It was agreed that article 7 of the UNCITRAL Conciliation Rules was a good basis for drafting the uniform provision.

57. The following suggestions were made concerning the drafting of the provision: to add facilitation of international trade as one of the objectives of conciliation; to refer to "ethics" in the wording modeled on paragraph 2 of article 7 of the UNCITRAL Conciliation Rules; to delete reference to "the rights and obligations of the parties", because in conciliation, unlike arbitration, settlement might be sought on bases other than legal rights and obligations (e.g. business interests of the parties); and to include reference to the "law" in the wording modeled on paragraph 2 of article 7 to avoid the implication that the applicable law was not relevant in seeking a settlement.

58. The Working Group requested the Secretariat to prepare a draft provision based on article 7 of the UNCITRAL Conciliation Rules. As to the proposed changes in the text modeled on article 7, the Working Group did not take any firm position but it was widely considered that, on balance, it was preferable not to deviate from the substance of article 7, which was tested in practice, was widely used as a model in non-legislative as well as legislative texts and was considered to be an appropriate expression of the essence of conciliation proceedings.

59. The Working Group considered additional topics which might be included in uniform provisions on conciliation. A number of matters were raised which the Working Group felt required further study and elaboration. Those included further work to clarify the scope of application of the uniform provisions, with particular focus on the nature of the agreement to conciliate and the general definition of the notion of such a procedure; the extent to which the

agreement to conciliate might be considered to be binding; procedural issues such as selection of the conciliator, date, time and place of conciliation, pre-conciliation exchange of documents, termination of conciliation, and liability of conciliators; issues particular to ad hoc as opposed to institution annexed or administered conciliation; and the need for, and the principles and issues to be included in, a preamble to the uniform provisions with the aim of promoting its use in the resolution of international commercial disputes. It was also suggested that the formulation of a code of ethics for conciliators might be considered by the Working Group to build confidence in the conciliation process by distilling issues from the best traditions and openly enunciating standards of practice. The Secretariat was requested to further study those issues based upon the discussion in the Working Group and to prepare material for consideration at a future session of the Working Group.

B. Enforceability of interim measures of protection
(A/CN.9/WG/WP.108, paras.63-101)

1. General considerations

60. There was general recognition in the Working Group of the fact that interim measures of protection were increasingly being found in the practice of international commercial arbitration and that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures. In some cases the very usefulness of the award for the winning party depended on whether the party had been able to enforce the interim measure designed to facilitate later enforcement of the award.

61. It was noted that in many legal systems a party to arbitral proceedings might request interim measures of protection from either the arbitral tribunal or a court, and there was no doubt in the Working Group that such a dual availability of those measures should be preserved. At the same time, it was noted that in some States there were no adequate regulations in that field.

62. It was observed that interim measures of protection ordered by arbitral tribunals were often combined with orders for the provision of appropriate security designed to protect one or both parties against misuse of interim measures. Such security was considered essential for the good functioning of interim measures and it was agreed that the uniform provisions to be prepared should take that into account.

63. A proposal was made, in particular, for elaboration of a general regime covering the adoption of interim measures of national and foreign courts in the period before the arbitral tribunal had been constituted and, at the choice of a party, by a court or the arbitral tribunal after it had been constituted (see below paras. 85-87).

64. It was further observed that interim measures of protection were temporary in nature in that any such measure ordered by an arbitral tribunal might be reviewed or altered if the circumstances of the case or the progress of arbitral proceedings required. That salient feature should be reflected in any uniform provision to be prepared. Yet another circumstance to be borne in mind was that interim measures of protection ordered by an arbitral tribunal may only be directed to a party or parties bound by the arbitration agreement and not to third parties. On the other hand, it was noted that, even if not directed at a third party, an interim measure may nevertheless affect third persons holding, for example, money or other assets of the party concerned, since they may be obliged to take some action in respect of that property by virtue of the order directed to the party.

65. It was noted that under the procedures used in some jurisdictions the arbitral tribunal might order a party to make an "interim payment" or "interim partial payment" to the other party (insofar as it was beyond doubt that the amount of the interim payment was due) and

that such payment was to be merged into the final award. There was general agreement that such orders for interim payment were not to be considered interim measures of protection as discussed by the Working Group and were not to be a subject matter of any uniform provisions to be prepared.

66. At various stages of the discussion of enforceability of interim measures of protection reference was made to the power of the arbitral tribunal to issue such measures, the scope of that power and procedures for issuing interim measures. Noting that a model legislative provision dealing with that power was contained in article 17 of the UNCITRAL Model Law on International Commercial Arbitration, it was recognized that the issue of enforceability of interim measures of protection should be considered separately from the issue of the power of the arbitral tribunal to order interim measures of protection and related procedural questions. (See below, paras. 80-84, for the discussion on the scope of interim measures that may be issued by an arbitral tribunal and conditions for issuance.)

2. Need for a uniform regime

67. There was general support in the Working Group for the proposition to prepare a legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals (document A/CN.9/WG.II/WP.108, para. 76). It was generally considered that that legislative regime should apply to enforcement of interim measures issued in arbitrations taking place in the State where enforcement was sought as well as outside that State (ibid., para. 92).

68. It was noted that a number of States had adopted legislative provisions dealing with the court enforcement of interim measures, and it was considered desirable that a harmonized and widely acceptable regime be prepared by the Commission.

69. During the discussion reference was often made to paragraph 63 of document A/CN.9/WG.II/WP.108, which distinguished three groups of interim measures of protection: (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award. While noting that that classification was one of a number of possible alternatives and that the examples of measures given under each category were not exhaustive, it was pointed out that the need for an enforcement mechanism was the greatest for measures under (c) (e.g. attachments of assets, orders not to remove the subject matter of the dispute out of the jurisdiction or orders to provide security) and for some of the measures under (b) (e.g. orders to continue performing a contract during the arbitral proceedings or orders to refrain from taking an action until the award was made). As to measures under (a) it was noted that, because the arbitral tribunal might "draw adverse conclusions" from the failure of the party to comply with the measure or might take the failure into account in the final decision on costs of the arbitral proceedings, there was less need to seek court intervention in the enforcement of the measure. However, no firm view was reached at that stage of the discussion as to whether, and if so in what way, those differences among interim measures should influence the drafting of the future enforcement regime.

3. Elements of a possible uniform provision

70. Various views were expressed as to whether the court requested to enforce an interim measure of protection should have discretion in making its decision concerning enforcement and, if so, what should be the extent of that discretion. Under one view, there should be no discretion in enforcing the measure, similar to the obligation of the court to enforce an arbitral award if the conditions of articles 35 and 36 of the UNCITRAL Model Law (or articles IV and V of the 1958 New York Convention) were met. Under another view, which received considerable support, it was felt that the regime contained in articles 35 and 36 of the

UNCITRAL Model Law was too rigid and did not take into account the special features of interim measures of protection which distinguished them from arbitral awards and which called for a degree of flexibility to be built into the uniform regime to be prepared. Those special features included the following: the temporary nature of interim measures and the resulting possibility that the measures might have to be modified or terminated; the need to adapt the interim measure to the enforcement procedures of the enforcing court; the possibility that the measure would affect the interests of third parties; and the possibility that the measure might have been issued *ex parte* (i.e. on the application of one party without hearing the other affected party) and that the requirement that both parties be heard would have to be complied with after the issuance of the interim measure.

71. There was broad agreement in the Working Group that the uniform regime should be based on the assumption that the court should not repeat the decision-making process in the arbitral tribunal that led to the issuance of the measure; in particular, the court should not review the factual conclusions of the arbitral tribunal or the substance of the measure. The court's discretion should be limited to procedural aspects of the enforcement of the measure. In that context the view was expressed that often it was not clear whether an issue was to be considered procedural or substantive and that the distinction was prone to controversy; therefore, it was desirable to avoid making the distinction, and, for that reason, the enforcement regime for interim measures should track as closely as possible the regime governing the enforcement of awards. Another view was that the scope of procedural discretion should be narrowly circumscribed so that the enforcement process would not be delayed and the court would not repeat the decision-making process of the arbitral tribunal. Under yet another view, it was difficult to be precise in describing the conditions for enforcement and that therefore the legislative provision should be broadly worded.

72. During the discussion of the above views, the Working Group considered possible approaches to the drafting of the uniform provision. One possible approach identified was that the uniform provision should be based on articles 35 and 36 of the UNCITRAL Model Law. The advantage of that approach was that the regime was known and tested in practice. It was also said that orders for interim measures, irrespective of whether called provisional awards or orders, were different from final awards. For that reason, articles 35 and 36 were not a suitable basis for an enforcement regime for interim measures of protection as those articles referred to a regime for enforcement of arbitral awards. It was, however, noted in response that interim measures of protection were in practice issued in different forms and under different labels, which included interim awards (see, e.g., arts. 26(2) and 32(1) of the UNCITRAL Arbitration Rules), and that the form in which the interim measure of protection was issued should not influence the decision whether articles 35 and 36 were a suitable basis for a regime of enforcement of interim measures of protection. Under another approach, the uniform provision would not list the grounds on which the court might refuse to enforce the measure, but would deal with issues such as the possibility of recasting the interim measure by the court; the possibility that the court might, upon request, repeal or amend its own decision to enforce the interim measure; the obligation by the party who obtained the enforcement of the measure to compensate the other party if the measure proved to have been unjustified from the outset; and a clarification that such a claim for compensation could be put forward in the pending arbitral proceedings. A further possible approach was to formulate a general provision which would be limited to providing that, if the party did not comply with the interim measure voluntarily, the competent court may be requested to render an enforcement order. Such a general provision might be complemented by provisions regarding the law to be applied by the court and security to be provided by a party. It was noted that all three approaches had been used in national laws and that the future uniform provision might be inspired by all of them. It was noted, in particular, that the second or third approach may be effected, for example, by adding to article 17 of the Model Law a general provision that a court should enforce the interim measure imposed by the arbitral tribunal; articles 35 and 36 would remain solely applicable to the enforcement of a final award.

73. It was said that any solution must be efficient and that, to the extent flexibility ought to be a factor, it was desirable to minimize the possibility of delay. It was considered that giving discretion to the court meant opening the scope for argument and delay. That consideration was said to be a further reason in favour of adopting the regime of articles 35 and 36 of the UNCITRAL Model Law. However, it was stated in response that, if properly defined, flexibility and discretion were desirable and that such flexibility did not necessarily increase the scope for delay; moreover article 36 of the Model Law might be said to give scope for delay such as when the party raised objections that the arbitration agreement was not valid, that proper notice was not given of the appointment of an arbitrator or of the arbitral proceedings or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place (art. 36(1)(a)(i), (ii) or (iv) of the Model Law).

74. In discussing how the enforcement regime of interim measures of protection should reflect the fact that such measures were temporary (in that the circumstances on the basis of which a particular measure was ordered by the arbitral tribunal might change by the time the court considered the request for enforcement or even thereafter), it was noted that the UNCITRAL Model Law on Cross-Border Insolvency dealt with the recognition of a foreign insolvency proceeding, whose status might also change over time and that some of the solutions in that Model Law might serve as an inspiration in devising the enforcement regime of interim measures of protection. The relevant provisions in the Model Law were contained in articles 17(4), 18 and possibly 22(2).

75. The Working Group engaged in a preliminary discussion of the question whether it should be only for the interested party to request the enforcement of the interim measure or whether the arbitral tribunal should also have a role in requesting enforcement. The view was expressed that the arbitral tribunal should not be put in a position where it would have to approach a national court with a view to obtaining enforcement of an interim measure ordered by it; thus, the enforcement of interim measures should be left entirely to the interested party. According to another view, however, it was useful to maintain a role for the arbitral tribunal in the enforcement of its measure, e.g. by providing that the request for enforcement could be made with leave of the arbitral tribunal or that the arbitral tribunal itself was able, but not obliged, to request enforcement.

76. An observation was made that the International Convention on Arrest of Ships, 1999, dealt with interim measures of protection and their enforcement and that some of the solutions of the Convention, in particular those in its article 7, might serve as a model in drafting the uniform provisions to be prepared by the Working Group.

77. It was suggested that any regime to be elaborated should not impose substantially more onerous conditions or higher fees or charges on the enforcement of interim measures issued outside the State of the enforcing court than are imposed on the enforcement of interim measures issued in that State (cf. art. III of the New York Convention).

78. The Working Group, in view of the preliminary stage of the discussion, did not take a decision as to the question whether the harmonized regime for the enforcement of interim measures should be in the form of an international convention or in the form of model legislation. While noting the view that the form of a convention was preferable, the Working Group considered that the decision as to the form would be made at a later stage. Notwithstanding that position, much of the discussion in the Working Group proceeded under the assumption that the solutions would be cast in the form of model legislation.

79. The Secretariat was requested to prepare alternative draft provisions based on the considerations in the Working Group to be discussed at a future session.

C. Scope of interim measures that may be issued by arbitral tribunal and procedures for issuance (A.CN.9/WG.II/WP.108, paras. 102-108)

80. The Working Group considered the desirability and feasibility of preparing a harmonized non-legislative text on the scope of interim measures of protection that an arbitral tribunal might order and procedural rules therefor.

81. Wide support was expressed for preparing a non-legislative text, such as guidelines or practice notes, which would discuss issues such as the types of interim measures of protection that an arbitral tribunal might order, discretion for ordering such measures, and guidelines on how the discretion was to be exercised or the conditions under which, or circumstances in which, such measures might be ordered. It was suggested that clarification provided by such guidelines should be broad in scope and should cover all interim measures of protection mentioned in paragraph 63 of document A.CN.9/WG.II/WP.108 (i.e. (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award). However, it was added that the guidelines would be particularly useful for measures with respect to which court enforcement was more frequently needed.

82. An observation was made that guidelines clarifying how the power of arbitral tribunals to order interim measures of protection was exercised would foster the acceptance by States of uniform legislative provisions on enforcement of those measures, which the Working Group had decided to prepare (see above, paras. 67). However, it was noted that those uniform legislative provisions would be prepared, and would apply, independently from the future non-legislative text discussing interim measures of protection that might be issued by an arbitral tribunal and procedures for their issuance.

83. It was suggested that in preparing the proposed text account should be taken of the inter-relationship between interim measures that might be ordered by a court and interim measures that might be ordered by the arbitral tribunal (e.g. the question whether a party might request an interim measure from a court after the arbitral tribunal had been constituted and was able to issue the requested measure itself, or whether a party, after unsuccessfully seeking an interim measure from the arbitral tribunal, might request such a measure from the court).

84. It was agreed that the Secretariat should prepare a document that would analyse rules and practices regarding interim measures of protection issued by arbitral tribunals and provide elements for the future harmonized non-legislative text. The Working Group was aware that the information needed for the preparation of the document was not readily available and therefore requested the States and international organizations participating in the considerations of the Working Group as well as experts interested in its work to send to the Secretariat relevant information (e.g. arbitration rules, academic and practice writings, as well as examples of texts of interim measures of protection ordered omitting the names of parties and other confidential information).

D. Proposal for preparing uniform provisions on court-ordered interim measures of protection in support of arbitration

85. In the context of the discussion of interim measures that might be issued by an arbitral tribunal (see above, paras. 80-84), it was proposed that the Working Group consider preparing uniform rules for situations in which a party to an arbitration agreement turned to a court with a request to obtain an interim measure of protection. It was pointed out that it was particularly important for parties to have effective access to such court assistance before the arbitral

tribunal was constituted, but that also after the constitution of the arbitral tribunal a party might have good reason for requesting court assistance. It was added that such requests might be made to courts in the State of the place of arbitration or in another State.

86. It was observed that in a number of States there were no provisions dealing with the power of courts to issue interim measures of protection in favour of parties to arbitration agreements; the result was that in some States courts were not willing to issue such interim measures while in other States it was uncertain whether and under what circumstances such court assistance was available. It was said that, if the Working Group decided to prepare uniform provisions on that topic, the ILA Principles on Provisional and Protective Measures in International Litigation (reproduced in paragraph 108 of document A.CN.9/WG.II/WP.108), as well as the preparatory work that lead to those Principles would be useful in considering the content of the proposed uniform rules.

87. The Working Group took note of the proposal and decided to consider it at a future session.

E. Requirement of written form for arbitration agreement (A/CN.9/WG.II/WP.108/Add.1, paras. 1-40)

88. It was generally observed that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form. It was noted that the practice in some respects was no longer reflected by the position set forth in article II(2) of the 1958 New York Convention (and other international legislative texts modelled on that article) if interpreted narrowly. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation. The existence of those doubts and a lack of uniformity of interpretation was a problem in international trade in that it reduced the predictability and certainty of international contractual commitments. It was further noted that current arbitration practice was different from what it was in 1958 in that arbitration was now widely accepted for resolution of international commercial disputes and could be regarded as usual rather than as an exception that required careful consideration by the parties before choosing something other than litigation before the courts.

89. It was observed that in many countries the arbitration agreement was required to be in writing to serve certain functions which included: providing evidence as to the conclusion of the agreement; enabling the parties to that agreement to be identified; and providing a warning as to the importance of renouncing rights of recourse to the courts. The view was expressed that, given the importance of those functions, the requirement for a strict interpretation of what constituted a writing should be preserved. In reply, it was suggested that, because the development of arbitration practice between 1958 and the current time made arbitration the preferred or the usual method for international commercial dispute resolution, the warning function was no longer as important as formerly.

90. It was also observed that a number of countries had no requirement for arbitration agreements to be concluded in writing in order to be valid, a situation which did not create problems with respect to proving an arbitration agreement since evidence of the existence of an agreement could be produced in any way that would suffice to prove the existence of a contract under general law. In order to accommodate not only those current developments in arbitration practice, but also likely future developments, the view was expressed that it might be appropriate to consider removing the writing requirement and aligning the practice with respect to arbitration agreements with that of contracts more generally. Another suggestion

was that it might be possible to focus on the circumstances in which an agreement might be considered to have been concluded. Those circumstances could include where there was an agreement in writing; where an agreement was evidenced by any other means as set forth in article 6 of the UNCITRAL Model Law on Electronic Commerce; where the agreement was concluded in accordance with usage recognized by the parties; or where the agreement was concluded in accordance with a usage of which the parties were aware or should have been aware because it pertained to the particular trade in which the parties were engaged.

91. As to the way in which an updated and uniform interpretation of the writing requirement could be achieved, a number of suggestions were made. One approach was to develop a model legislative provision, based upon article 7 of the UNCITRAL Model Law on International Commercial Arbitration, to clarify for the avoidance of doubt the interpretation of the requirement for writing since that provision represented a widely accepted international standard on which considerable practice had developed. Suggestions were made that the model legislative provision might possibly follow a more general approach such as the one in article 178(1) of the Swiss Federal Act of Private International Law, in article 1021 of the Arbitration Act of the Netherlands, or the somewhat more detailed approach in section 1031 of the German Arbitration Law of 1997 or section 5 of the English Arbitration Act of 1996 (those national legislative provisions are reproduced in paras. 29-31 of document A/CN.9/WG.II/WP.108/Add.1). Another suggestion, which addressed the issue in terms of the impact of electronic commerce, was to promote the adoption of the UNCITRAL Model Law on Electronic Commerce, which would have the advantage of addressing the writing issue at a broader level than that related simply to arbitration agreements (for the discussion of this topic, see below, paras. 100-106). An alternative view was that no new provisions were needed, as article 7 of the UNCITRAL Model Law on International Commercial Arbitration itself was sufficient for the purpose of providing an updated standard. Promoting wider adoption and uniform interpretation of the Model Law would lead, in time, to the required level of international uniformity.

92. Noting that there was a need for article II(2) of the New York Convention to be interpreted in accordance with a desired updated standard as to the form requirement, the Working Group discussed the question of how that objective could best be achieved. A number of different views were expressed on the issue. One view was that a protocol amending the terms of article II of the New York Convention was required. Another view was that amending the New York Convention in that way was a course of action likely to exacerbate the existing lack of harmony. It was observed that the Convention was widely adopted and extremely successful; that discussing changes to the writing requirement of the Convention could lead to suggestions for changes to other provisions which should not be reopened; and that adoption of a protocol by a number of countries was likely to take a significant number of years and, in the interim, to create more uncertainty as two different regimes would potentially apply.

93. An alternative suggestion was for the adoption of a declaration, resolution or statement addressing the interpretation of the Convention and providing that, for the avoidance of doubt, article II(2) of the Convention was intended to cover certain situations or to have a certain effect. It was observed that although that instrument would not be formally adopted as a treaty by States members of the Convention, it would potentially have persuasive force and could be considered as material assisting with the interpretation of the Convention within the terms of the Vienna Convention on the Law of Treaties. It was noted that a similar approach had been adopted in relation to other conventions, such as the Convention on the Law applicable to Contractual Obligations (Rome, 1980) and the Convention on the Law applicable to International Sales of Goods (The Hague, 1955). As to the body to adopt such a statement or declaration, it was suggested that UNCITRAL, the core legal body in the United Nations system for the development of international trade law and a body whose work in the area of arbitration had gained universal recognition, was the appropriate body to take such an action. Alternatively, States members of the New York Convention might take that action. Concerns

were expressed that that approach might create uncertainty as to the status of those States not accepting the instrument and as to the possible application of reciprocity between States. It was also suggested that a declaration or recommendation was not binding on national courts and there was therefore no certainty that it would be universally followed, even if promoted by UNCITRAL.

94. As a further alternative, it was suggested that a liberal interpretation of the New York Convention should be encouraged by following the approach of some courts as noted in document A/CN.9/WG.II/WP.108/Add.1 at footnote 9, according to which the writing requirement in the New York Convention should be interpreted in the light of the subsequent UNCITRAL Model Law, whose authors wished to adapt the regime of the Convention to current needs without modifying the Convention. Another possibility suggested was to prepare practice guidelines or notes which could set out the use of article 7 of the Model Law as an interpretation tool to clarify the application of article II(2), along the lines discussed in paragraphs 33 and 34 of document A/CN.9/WG.II/WP.108/Add.1.

95. The Working Group exchanged views as to whether the cases listed at paragraph 12 of document A/CN.9/WG.II/WP.108/Add.1 would be covered by national law provisions addressing form requirements for the arbitration agreements, particularly in States that had not enacted the Model Law. A number of different views were expressed and it was clear that there was no common position for all States. It was also noted that the answer might differ if the question related to enforcement of a domestic award or a foreign award, where the terms of the New York Convention would be relevant. Cases (a) to (h), which related to issues of writing and exchange, and thus to the manifestation of the will of the parties, were said to be distinguishable from cases (i) to (l), which were considered to relate to matters outside the form requirement and were covered by the law governing the way in which rights and obligations that were validly assumed by a party (including those arising from an arbitration agreement) were transferred from that party to third parties or were extended to include third parties. The discussion showed that in some States cases (a) to (h) would generally be covered by the requirements of national law relating to the form of arbitration agreements, while in others it was said that certain cases would not be covered or that it was doubtful whether they were covered. Cases (a) and (d), for example, were not covered in some States with a more restrictive interpretation of the writing requirement. In some cases, the question of coverage depended upon what was intended by the parties and no clear general answer could be given. Case (c) was said to be covered in some cases if the broker was deemed to represent both parties to the agreement, but was not covered if it was not representing both parties. As to bills of lading (which were typically signed by the master of the ship only), it was said that they were generally regarded by the participants in the shipping industry as evidence of valid and binding agreements to arbitrate or that, despite certain doubts, they were regarded as valid as cases *sui generis*. It was suggested that cases (i) to (l), which raised issues of assignment, subrogation, incorporation by reference and third party rights, should not be addressed by the Working Group. Case (m) was widely considered to raise difficult issues and had not gained wide acceptance.

96. The Working Group also considered whether article II(2) of the New York Convention could be interpreted to cover all of the cases listed in paragraph 12. As in the case of national law provisions, the views expressed in the Working Group differed as to the various cases and whether or not the Convention would be interpreted to cover all of them. It was noted that the views were somewhat tentative because the cases considered were described too generally to allow definitive answers; nevertheless, the discussion showed that it was either doubtful or that there was no general agreement as to whether or not article II(2) of the New York Convention should be interpreted to cover all of the cases in paragraph 12. In addition, it was not clear how frequently the issues set forth in paragraph 12 arose in practice and how urgent they might therefore be considered to be.

97. The Working Group heard statements showing that there existed in court practice a trend towards a more liberal and updating interpretation of article II(2) of the Convention. One example that was discussed was that of England where the expression "The term 'agreement in writing' *shall include*" (emphasis added) in article II(2) of the Convention indicated that the list of forms mentioned therein was not exhaustive and could be extended to cover a wider variety of circumstances. Such an interpretation would mean, it was suggested, that most of the cases set forth in paragraph 12 would be covered by the Convention. The scope of the provision, however, was not unlimited. As a minimum form requirement, the English Arbitration Act 1996 did contain a requirement for some writing in connection with the arbitration agreement - the terms of the arbitration agreement must be set out in writing even if the party expressed consent to those terms in some way other than by writing such as by oral agreement or by part performance of the contract. The view was expressed that what the Working Group should consider was not whether the cases set out in paragraph 12 were covered by the Convention or not, but whether article II(2) could be regarded as an exhaustive provision and, if not, what the minimum form requirement for an arbitration agreement to be covered by the Convention should be. A different view of article II(2) was that it provided a uniform rule on the types of situations which were intended to be covered by the Convention and that (while requirements more restrictive than the ones specified in article II(2) were not permitted by the Convention) less restrictive requirements than the ones in article II(2) were not covered by the Convention. On that view, not all of the cases in paragraph 12 would be covered by article II(2). It was noted at the end of the discussion that the question of whether article II(2) established a uniform rule or a minimum standard remained controversial.

98. After discussion, no agreement was reached as to whether article II(2) of the New York Convention would be interpreted to cover the particular cases set forth in paragraph 12. However, the Working Group considered the question of whether those cases should be covered by the writing requirement and how that could be achieved. There was general support for the view that contract practices and the role of international commercial arbitration in international trade required that in principle all cases mentioned in paragraph 12 (with the possible exception of the case of "group of companies" mentioned under (m)) should be included as meeting the written form requirement, provided that there was an agreement in substance between the parties (or that a party subsequently became bound by an arbitration agreement), together with written evidence of that agreement, which, however, did not amount to requiring a document signed by both parties or an exchange of messages between the parties. It was felt that that approach would comply with two considerations underlying the form requirement for the arbitration agreement: (a) that there was sufficient evidence of the mutual will to arbitrate and thus to exclude court jurisdiction and (b) that there was some writing with respect to arbitration and thus the parties were on notice (or were warned) that they were excluding court jurisdiction. In that connection an observation was made that the purpose of parties when they agreed to arbitration was to avoid all courts and that in most multinational cases it would be difficult to determine which was the court whose jurisdiction was being excluded; therefore, it was said, the warning function in international trade, in light of the growing importance of arbitration, was losing its importance.

99. After discussion, the view was adopted by the Working Group that the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could be achieved by: preparing a model legislative provision clarifying, for avoidance of doubt, the scope of article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; preparing a guide explaining the background and purpose of the model legislative provision; and adopting a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. As to the substance of the model legislative provision and the interpretative instrument to be prepared, the Working Group adopted the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of that agreement. It was noted that the issue of how best to achieve uniform interpretation of the New York

Convention through a declaration, resolution or statement should be further studied, including the public international law implications, to determine which was the optimal approach.

F. Arbitration agreement "in writing" and electronic commerce (A/CN.9/WG.II/WP.108/Add.1, paras. 35-40)

100. The Working Group considered the question of whether article II(2) of the New York Convention should be interpreted broadly to include communications by electronic means as defined by the UNCITRAL Model Law on Electronic Commerce in article 2. It was recalled that the Guide to Enactment to the Model Law, an instrument adopted by the Commission, was drafted with a view to clarifying the relationship between the Model Law on Electronic Commerce and international instruments such as the New York Convention and other trade law instruments. The Guide, at paragraph 6, suggested that the Model Law on Electronic Commerce "may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form". It was also noted that article 7(2) of the Model Law on International Commercial Arbitration expressly validated the use of any means of telecommunication "which provides a record of the agreement", a wording which would cover telecopy or facsimile messages as well as most common uses of electronic mail or electronic data interchange (EDI) messaging.

101. There was general agreement in the Working Group that, in order to promote the use of electronic commerce for international trade and leave the parties free to agree to the use of arbitration in the electronic commerce sphere, article II(2) of the New York Convention should be interpreted to cover the use of electronic means of communication as defined in article 2 of the Model Law on Electronic Commerce and that it required no amendment to do that. It was also considered that, in addition to the New York Convention, other conventions relevant to international arbitration such as the European Convention on International Commercial Arbitration (Geneva, 1961) and the Inter-American Convention on International Commercial Arbitration (Panama, 1975), should also be interpreted in the same way. As doubts were raised as to whether UNCITRAL was the appropriate forum to address that issue in respect of all of those Conventions, it was agreed that the issue should be studied and the optimal solution found in consultation with the organizations that sponsored the preparation of those conventions.

102. On the question of how the desired updating interpretation could be achieved, the Working Group made a number of proposals. One proposal was that the Model Law on Electronic Commerce could be used as an interpretative instrument as noted in the Guide to Enactment. Concern was expressed that that approach might have limited effect. While the Model Law was being applied in an increasing number of countries, it was not universally adopted. Furthermore it was noted that, because of the flexibility of the model law form, the Model Law might be enacted in different ways and that, therefore, the desired uniform interpretation would not be achieved.

103. A second proposal was for a declaration confirming the desired interpretation to be adopted by UNCITRAL or perhaps by the States members of the Conventions. In support of the use of a declaration, it was recalled that the Working Group had already considered and identified that form of instrument as a potentially useful way of addressing the interpretation of the writing requirement in article II(2) (see above, para. 93). It was proposed that the same measure should apply to electronic communications, although questions were raised as to whether the two declarations should be linked together. For the same reasons as discussed in the context of the writing requirement, it was suggested that any such declaration should be drafted on the basis that the UNCITRAL Model Law on Electronic Commerce can be used, by

itself, as a tool to interpret the Conventions and that therefore the declaration should be framed in terms of "For the avoidance of doubt ..." (see above, para. 91).

104. A third proposal was to seek a solution in the context of a broader idea (which had been raised and discussed by the Commission at its thirty-second session (A/54/17, para. 316)) of preparing an "omnibus" protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce, as noted in paragraph 39 of document A/CN.9/WG.II/WP.108/Add.1. Little support was expressed in favour of that proposal. The Working Group was of the view that more studies were needed before a decision could be made on the nature of such instrument to be adopted and the possibility of drafting a commentary was also voiced.

105. Having concluded the discussion on the desirability of ensuring that article II(2) of the New York Convention (and the relevant provisions in other Conventions that followed that model) would validate electronic communications, concerns were expressed as to possible implications of limiting the proposed interpretative instrument to the requirement of writing for the arbitration agreement. It was noted that other provisions in the New York Convention (as well as in other Conventions on international commercial arbitration) contained additional requirements of writing which, if not interpreted to include electronic means of communication, might potentially operate as barriers to the facilitation of electronic commerce. Included among those were the requirements to provide originals of the arbitration agreement and the award in article IV of the New York Convention. The view was expressed that the issue of electronic commerce should be approached from a perspective broader than the writing requirement for the arbitration agreement and that, in considering steps to be taken with respect to the writing requirement for arbitration agreements, other form requirements in instruments governing international commercial arbitration should also be studied. It was also suggested that treating these issues as separate had the potential to encourage a proliferation of interpretative declarations on points that may be regarded, in the future, as requiring clarification.

106. After discussion, the Working Group requested the Secretariat to prepare a draft instrument that would confirm that article II(2) of the New York Convention should be interpreted to include electronic communications as defined by article 2 of the Model Law on Electronic Commerce. In drafting that instrument, the Secretariat should study the other form requirements in the New York Convention and prepare appropriate drafts to facilitate discussion in the Working Group as to the treatment of other writing requirements.

G. Possible topics for future work (A.CN.9/WG.II/WP.108/Add.1, para. 42)

107. Having completed its discussion on the topics set forth in documents A/CN.9/WG.II/WP.108 and Add.1, the Working Group exchanged views and information on other arbitration topics that had been identified by the Commission as likely items of future work and which had been considered by the Commission at its thirty-second session. The complete list of those topics (reproduced in document A/CN.9/WG.II/WP.108, paragraph 6), which included the three topics considered at length at the current session of the Working Group, was as follows:

a) Conciliation (A/CN9/460, paras. 8-19; A/54/17, paras. 340-343);
b) Requirement of written form (A/CN.9/460, paras. 20-31; A/54/17, paras. 344-350);
c) Arbitrability (A/CN.9/460, paras. 32-34; A/54/17, paras. 351-353);
d) Sovereign immunity (A/CN.9/460, paras. 35-50; A/54/17, paras. 354-355);
e) Consolidation of cases before arbitral tribunals (A/CN.9/460, paras. 51-60; A/54/17, paras. 356-357);

f) Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71; A/54/17, paras. 358-359);
g) Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79; A/54/17, paras. 360-361);
h) Decisions by "truncated" arbitral tribunals (A/CN.9/460, paras. 80-91; A/54/17, paras. 362-363);
i) Liability of arbitrators (A/CN.9/460, paras. 92-100; A/54/17, paras. 364-366);
j) Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106; A/54/17, paras. 367-369);
k) Costs of arbitral proceedings (A/CN.9/460, paras. 107-114; A/54/17, para. 370);
l) Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127; A/54/17, paras. 371-373);
m) Possible enforceability of an award that has been se aside in the State of origin (A/CN.9/460, paras. 128-144; A/54/17, paras. 374-376).

108. Other topics considered were those mentioned in paragraph 339 of the report of the Commission on the work of its thirty-second session (document A/54/17):

a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties;
b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances;
c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association;
d) Questions relating to the interpretation of legislative provisions such as those in article II(3) of the New York Convention (or article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued; and
e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. It was noted that those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

109. A number of other topics concerning the New York Convention, proposed by arbitration experts, were raised for possible consideration by the Working Group. Those included:

a) The meaning and effect of a non-domestic award, that is an award not considered as a domestic award in the State where its recognition and enforcement was sought (article I(1), second sentence);
b) Clarification of what constituted an arbitral award under the Convention. Did it cover, for example, awards on agreed terms; "Treaty awards"; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*;

c) Determination of the law applicable to arbitrability under article II(1);

d) Field of application of article II(3) concerning the enforcement of the arbitration agreement;

e) Law applicable to agreements that might be "null and void, inoperative, or incapable of being performed" under article II(3);

f) Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention;

g) Enforcement conditions and procedure referred to in article III, as implementing legislation showed diverging solutions;

h) Period of limitation for enforcement of a Convention award where again implementing legislation showed a range of different periods;

i) Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V;

j) Meaning and effect of the suspension of an arbitral award in the country of origin (article V(i)(e)); and

k) Meaning and effect of the more-favourable-right provision of article VII(1).

110. It was noted that a number of those possible additional topics might partly touch upon or overlap with topics already discussed by or raised in the Commission, but that they were raised here as matters that might be of interest to the Working Group for possible further consideration. It was noted that items (g) and (h) (above, para. 109) were the subject of the project being jointly undertaken by UNCITRAL and Committee D of the International Bar Association to monitor the legislative implementation of the New York Convention (A/54/17, paras. 331-332).

111. The Working Group, by way of an initial and tentative response, expressed particular interest in a number of the items set forth in paragraphs 108 and 109 above. Support was expressed in favour of preparatory work by the Secretariat of items (a), (b), (d) and (e) of paragraph 108 on the basis that they were of significant practical importance. Item (d), in particular, was noted as causing uncertainty and, potentially, delay in a number of States. In respect of item (e), it was noted that article II(3) of the New York Convention left doubts for some courts as to how they should proceed, which resulted in a diversity and inconsistency of approaches; for example, some courts, when they considered a request (e.g. under art. II(3) of the New York Convention) to refer the parties to arbitration, followed the spirit of the Convention and limited their consideration to whether the arbitration agreement was *prima facie* valid (and, if it was found to be *prima facie* valid, referred the issue to be determined by the arbitral tribunal), while other courts considered the validity of the arbitral agreement themselves and reached a final decision. It was noted that bringing greater clarity to those issues would better define the inter-relationship between courts and arbitral tribunals in arbitration matters. Some support was also expressed in favour of considering items (a), (b) and (e) of paragraph 109 above.

112. In terms of the items already discussed and accorded priority by the Commission, as set forth in paragraph 107 above, interest was reiterated in a number of those. With respect to item (m) (possible enforceability of awards that had been set aside in the State of origin), to which the Commission had accorded priority, a view was expressed that the case for its further consideration did not fully appreciate the fact that, in practice, the issue was not expected to raise many problems and that cases cited in connection with that issue should not be regarded as precedent. It was suggested, however, that (as noted above in paragraph 109(i)), that item involved a broader spectrum of issues, such as, the question of the discretionary power to enforce an award even where a ground for refusal existed (such as a minor procedural defect or a defect that did not influence the outcome of the arbitration). Other items in paragraph 107 in which interest was expressed in the Working Group were (e) consolidation of cases before arbitral tribunals; (f) the duty of confidentiality, with regard to both arbitration and conciliation; (g) jurisdiction for claims raised for the purpose of set-off; (h) decisions by truncated tribunals; (j) the power to award interest and possibly other issues

relating to interest; and (k) costs of arbitral proceedings.

113. Recalling the discussion of increased use of electronic commerce and the question whether electronic messages complied with formal requirements for arbitration agreements and other formal requirements (see above, paras. 100-106), the Working Group took note of suggestions that it would be useful to review the implications of "on-line" arbitrations, i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communications.

114. The Secretariat was requested to take into account the views expressed in the Working Group in preparing material to be considered by the Working Group at future sessions. In order to facilitate that preparatory work by the Secretariat, States and interested international organizations were requested to provide material on court or arbitration cases and examples of provisions from national laws that would assist the Secretariat in preparation of this material.

H. Other Business

115. The Working Group was informed by representatives of the UN/ECE Advisory Group on the European Convention on International Commercial Arbitration (Geneva, 1961) of the United Nations Economic Commission for Europe of the meeting of the Advisory Group on 17 and 18 February 2000 in Vienna at which the Group concluded that the Convention (a) remained useful; (b) provided a utility beyond that of existing conventions (in particular, as a common set of minimum standards to be observed in international arbitration); and (c) could be made even more useful to both existing and potential new contracting States if it were updated. The Advisory Group concluded at its February meeting to modify article IV of the Convention and the Agreement relating to Application of the European Convention on International Commercial Arbitration. No consensus was reached as to whether any additional changes to the Convention should be made. The Commission appreciated the report and expressed the hope that any future work in the Economic Commission for Europe would not duplicate the work undertaken at the global level by UNCITRAL .

116. The Working Group also heard with appreciation the plans of the Economic Commission for Europe to provide, in the context of the Southeast European Cooperative Initiative (SECI), advice and assistance to foster the smooth functioning of international commercial arbitration in the States members of SECI.